FILED

OCT 10 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-914

SARAH SCHEUER, Administratrix of the Estate of Sandra Lee Scheuer, Deceased,

Petitioner,

-v.-

JAMES RHODES, SYLVESTER DEL CORSO, ROBERT CANTERBURY, HARRY D. JONES, JOHN E. MARTIN, RAYMOND J. SRP, Various Officers and Enlisted Men, and ROBERT WHITE,

Respondents.

AND

No. 72-1318

ARTHUR KRAUSE, Administrator of the Estate of Allison Krause, Deceased,

Petitioner,

-v.-

GOVERNOR JAMES RHODES, SYLVESTER DEL CORSO and ROBERT CANTERBURY,

Respondents,

and

ELAINE B. MILLER, Administratrix of the Estate of Jeffrey Glenn Miller, Deceased,

Petitioner,

-v.-

JAMES RHODES, SYLVESTER DEL CORSO, ROBERT CANTERBURY, HARRY D. JONES, JOHN E. MARTIN, RAYMOND J. SRP, ALEXANDER STEVENSON AND VARIOUS OFFICERS AND ENLISTED MEN AND ROBERT WHITE,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS DEL CORSO, CANTERBURY, JONES, MARTIN, SRP AND WHITE

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BRIEF[1] OF RESPONDENTS DEL CORSO, CANTERBURY, JONES, MARTIN, SRP AND WHITE

[1]On July 11, 1973, during a telephone conversation between this Court's Mr. Rodak and Mr. Howarth, one of the attorneys representing respondents herein, Mr. Rodak granted respondents' request that they be permitted to file a single brief in the two cases above captioned. The substance of this telephone conversation was confirmed by letter from Mr. Howarth to Mr. Rodak of the same day.

QUESTIONS PRESENTED

1. Under respondents' first argument (ARGUMENT, pp. 14-21 *infra*), "The Lower Court Properly Considered the Complaints' Allegations," the Scheuer brief's third question (Sch. Br. 4)[2] and the first question presented by the Krause-Miller brief (K.-M. Br. 7) are examined. Respondents are not satisfied with petitioners' simplistic definition of the question in that the relevant *issues* are obscured. Consequently, the following two questions are considered by respondents:

A. Is a United States District Court required to take a complaint's allegations as true when deciding a Rule 12b(1), Fed. R. Civ. P., motion to dismiss?

B. Is a United States District Court required to take a complaint's allegations as true when deciding a Rule 12b(6), Fed. R. Civ. P., motion to dismiss?

2. Under respondents' second argument (ARGUMENT, pp. 22-38 *infra*), "The Lower Court Properly Dismissed the Complaints for Their Failure to State a Claim Upon Which Relief Could Be Granted," respondents consider the second question presented by the Scheuer brief (Sch. Br. 4) and the third question of the Krause-Miller brief (K.-M. Br. 7). Respondents wish to more accurately present the issues included therein:

A. ***Respondent, Governor James A. Rhodes.***

[2]For purposes of respondents' brief, "Sch. Pet.", together with Arabic numerals, refers to pages of the Scheuer Petition for Writ of Certiorari containing a copy of Mrs. Scheuer's complaint and the Opinion of the United States Court of Appeals for the Sixth Circuit. "Sch. Br.", together with Arabic numerals, refers to pages of the Brief of Petitioner, Mrs. Scheuer. "K.-M. Br." and "K.-M. App." together with Arabic numerals, refers to pages of Mr. Krause and Mrs. Miller's Appendix and Brief of Petitioners, respectively. "K.-M. Pet.", together with Arabic numerals, refers to pages of the Krause-Miller Petition for Writ of Certiorari containing the Opinion of the district court.

1. **Under the facts of this case, does the Governor of the State of Ohio possess *unqualified* executive immunity for his discretionary acts *vis-à-vis* a 42 U.S.C. Section 1983 cause of action?**

2. **Under the facts of this case, does the Governor of the State of Ohio possess *unqualified* executive immunity for his discretionary acts *vis-à-vis* a wrongful death cause of action brought under diversity jurisdiction?**

B. ***The Remaining Respondents.***

1. **Under the facts of this case, do the President of Kent State University, the Adjutant General of the State of Ohio, the Assistant Adjutant General of the State of Ohio, and the named officers of the State of Ohio's organized Militia possess *qualified* executive immunity *vis-à-vis* a 42 U.S.C. Section 1983 cause of action?**

2. **Under the facts of this case, do the President of Kent State University, the Adjutant General of the State of Ohio, the Assistant Adjutant General of the State of Ohio, and the named officers of the State of Ohio's organized Militia possess *qualified* executive immunity *vis-à-vis* a wrongful death action brought under diversity jurisdiction?**

3. Under respondents' third argument (ARGUMENT, pp. 38-66 *infra*), "The Lower Court Lacked Subject Matter Jurisdiction," the Scheuer brief's first question (Sch. Br. 3-4) and the second question presented by the Krause-Miller brief (K.-M. Br. 7) are considered. The Krause-Miller brief's fourth question, relating to the federal court's diversity of citizenship jurisdiction (K.-M. Br. 7), is also examined within respondents' third argument. Respondents are satisfied with petitioners' presentation of these questions.

4. Respondents' fourth argument (ARGUMENT, pp. 66-74 *infra*), "The Allegations of Petitioners' Complaints

Concerning the Propriety of Training and Weaponry of the Ohio National Guard Raise Non-Justiciable Political Questions," considers the Scheuer brief's fourth question presented (Sch. Br. 4) relating to the applicability of the *Gilligan v. Morgan*, U.S. , 37 L.Ed.2d 407 (1973), precedent to the realities now before this Court. The all-inclusive language of petitioner's question is inappropriate in that the lower court's holding of non-justiciability related only to a limited class of petitioners' allegations.

5. Respondents' fifth argument (ARGUMENT, pp 74-76 *infra*), "The Federal Government Is an Indispensable Party to the Ajudication of Petitioners' Allegations Concerning the Training and Weaponry of the Ohio National Guard," examines the Krause-Miller brief's fifth question (K.-M. Br. 8). Again, petitioners' sweeping language is improper since the lower court's indispensable party ruling focused on a limited number of petitioners' allegations.

CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION

Article I, Section 8, Clause 16:

> The Congress shall have Power . . . To provide for organizing, arming and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

Article VI, Clause 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land . . .

Amendment XI:

The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . .

Amendment XIV:

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

UNITED STATES CODE, TITLE 28

Section 1331:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Section 1332:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

Section 1343:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Section 1652:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

UNITED STATES CODE, TITLE 32

Section 108:

If, within a time to be fixed by the President, a State does not comply with or enforce a requirement of, or regulation prescribed under, this title its National Guard is barred, wholly or partly as the President may prescribe, from receiving money or any other aid, benefit, or privilege authorized by law.

Section 110:

The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard.

Section 501:

(a) The discipline, including training, of the Army National Guard shall conform to that of the Army. The discipline, including training, of the Air National Guard shall conform to that of the Air Force.

(b) The training of the National Guard shall be conducted by the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia in conformity with this title.

Section 701:

So far as practicable, the same types of uniforms, arms, and equipment as are issued to the Army shall be issued to the Army National Guard, and the same types of uniforms, arms, and equipment as are issued to the Air Force shall be issued to the Air National Guard.

UNITED STATES CODE, TITLE 42:

Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

OHIO CONSTITUTION

Article I, Section 16:

* * *

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law. (As amended September 3, 1912.)

Article III, Section 10:

He (Executive) shall be commander-in-chief of the military and naval forces of the State, except when they shall be called into the service of the United States.

Article IX, Section 3:

The Governor shall appoint the Adjutant General, Quartermaster General, and such other staff officers, as may be provided for by law. Majors General, Brigadiers General, Colonels, or Commandants of Regiments, Battalions, or Squadrons, shall, severally, appoint their staff, and Captains shall appoint their noncommissioned officers and musicians.

Article IX, Section 4:

The Governor shall commission all officers of the line and staff, ranking as such; and shall have power to call forth the Militia, to execute the laws of the State, to suppress insurrection, and repel invasion.

OHIO REVISED CODE

Section 3341.01:

The Bowling Green state normal school, and the Kent state normal school, established under 101 O. L. 320, shall be known as the 'Bowling Green State University' and the 'Kent State University,' respectively.

Section 3341.02 (B):

The government of Kent state university is vested in a board of nine trustees, who shall be appointed by the governor, with the advice and consent of the senate. . . .

Section 3341.04:

The boards of trustees of Bowling Green state university and Kent state university, respectively, shall elect, fix the compensation of, and remove the president and such number of professors, teachers, and other employees as may be deemed necessary by said boards. The boards shall do all things necessary for the proper maintenance and successful and continuous operation of such universities.

Section 5919.02:

All commissioned officers of the Ohio national guard shall be appointed by the governor as commander in chief, upon the recommendation of the commanding officers of the organizations to which such officers are to be assigned for duty, and be commissioned according to grade in the department, corps, or arm of the service in which they are appointed. . . .

Section 5919.05:

Commissioned officers of the Ohio national guard shall take and subscribe to the following oath of office: 'I, _____ _____ _____, do solemnly swear that I will support and defend the constitution of the United States and the constitution of the state of Ohio, against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will obey the orders of the president of the United States and of the Governor of the state of Ohio; that I make this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office of _____ in the National Guard of the United States and of the state of Ohio, upon which I am about to enter, so help me God.'

Section 5923.21:

The organized militia may be ordered by the governor to aid the civil authorities to suppress or prevent riot or insurrection, or to repel or prevent invasion, and shall be called into service in all cases before the unorganized militia.

Section 5923.22:

When there is a tumult, riot, mob, or body of men acting together with intent to commit a felony, or to do

or offer violence to person or property, or by force and violence break or resist the laws of the state, the commander in chief may issue a call to the commanding officer of any organization or unit of the organized militia, to order his command or part thereof, describing it, to be and appear, at a time and place therein specified, to act in aid of the civil authorities.

No officer or enlisted man in the organized militia, shall refuse to appear at the time and place designated when lawfully directed to do so in conformity to the laws for the suppression of tumults, riots, and mobs, or shall fail to obey an order issued in such case. [See: penalty provision, O.R.C., Section 5923.99(A) *infra.*]

Section 5923.231:

After issuing an order to duty pursuant to section 5923.21 of the Revised Code, the governor, if in his judgment any breakdown of law and order impends; may by proclamation, declare that the organized militia under the command of the governor shall execute the laws and keep the peace in a designated area. Under these circumstances, any arrest and detention of civilians by military authorities shall be for the purpose of escorting such civilians to civil authorities. The governor shall, by subsequent proclamation, order cessation of the duties entrusted to the militia when, in his judgment, his original proclamation is no longer required.

Section 5923.37:

When a member of the organized Militia is ordered to duty by State authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct.

Section 5923.99 (A):

Whoever violates Section 5923.22 or 5923.31 of the Revised Code shall be fined not more than one thousand dollars or imprisoned not more than six months, or both.

STATEMENT OF THE CASE

Respondents are satisfied with petitioners' resumes of the case (Sch. Br. 5-11, K.-M. Br. 8-10), excepting the argument (See, *e.g.*, Sch. Br. 8-9) contained therein and subject to the following correction of error.

First, the court of appeals did not hold that, " . . . *the defendants* enjoyed the defense of *absolute* personal immunity . . ." (K.-M. Br. 10; emphasis added). Rather, the lower court held that Respondent Rhodes had *absolute* immunity (Sch. Pet. 12a) but that the remaining respondents possessed only a *qualified* personal immunity (Sch. Pet. 20a). Further, petitioners are incorrect when asserting that the lower courts " . . . [failed to give] any consideration to the diversity claims of these petitioners . . . " (K.-M. Br. 10). Both the district court (K.-M. Pet. 37-44) and the court of appeals (Sch. Pet. 14a-15a) considered the Eleventh Amendment and Article I, Section 16, of the Ohio Constitution, prohibiting the federal courts from exercising diversity jurisdiction over petitioners' wrongful death actions.[3]

Additionally, respondents wish to emphasize and bring to this Court's attention certain uncontradicted facts before the trial court.

1. There were but seven defendants within the personal jurisdiction of the trial court, and upon whom the judg-

[3]The Ohio wrongful death statute is found at §2125.01, Ohio Revised Code, and not §5923.37, Ohio Revised Code, as stated in the Krause-Miller brief (K.-M. Br. 9).

ment of the lower court is premised; to-wit, Governor Rhodes, Adjustant General Del Corso, Assistant Adjutant General Canterbury, Major Jones, Captains Martin and Srp, and President White (Sch. Pet. 20a).

2. Presented to the trial court as evidentiary exhibits appended to respondents' motions to dismiss were relevant Executive Proclamations evincing that, at the time petitioners' alleged causes of action arose, the Ohio National Guard, including the respondents herein, had been called to active duty pursuant to the statutory law of Ohio (Sch. Pet. 3a, 23a-26a).

3. Further, the substance of the relevant Executive Proclamations, cited above, factually demonstrated to the lower courts that a condition of insurrection and rampage existed at the Kent State University, and that, in response thereto, the Ohio National Guard, including the respondents, were ordered and authorized by Governor Rhodes to take that action necessary to protect life and property on and to restore order to the Kent State University (Sch. Pet. 3a, 23a-26a).

4. Petitioners' complaints acknowledge that, at the time petitioners' causes of action arose, the respondents were all agents of the State of Ohio; that respondents were ordered to active duty by the Governor of Ohio; and that none of the respondents herein fired the shots, killing petitioners' decedents (Sch. Pet. 83a-91a; K.-M. Pet. 47-57).

5. Attached to respondents' motion to dismiss in the *Krause* case were affidavits of Respondents Del Corso and Canterbury stating:

> "4. At the time plaintiff's alleged causes of action arose, I [Respondent Del Corso] was in Columbus, Ohio, and not on the Kent State Campus. (K.-M. App. 27)"

"4. Although I was on the Kent State Campus when plaintiff's alleged cause of action arose, I [Respondent Canterbury] made no decision nor gave any orders which caused any weapons to be fired at the deceased Allison Krause. (K.-M. App. 28)."

SUMMARY OF ARGUMENT

The ARGUMENT, hereinafter set forth, initially demonstrates (A.) that the lower courts properly inquired into the realities presented by petitioners' complaints when considering respondents' Rule 12b(1), Fed. R. Civ. P., motions to dismiss. Thereafter, it is shown that (B.) the lower courts paid all due allegiance to the allegations of petitioners' complaints when ruling upon respondents' Rule 12b(6), Fed. R. Civ. P., motions to dismiss (ARGUMENT, pp. 14-21 *infra*).

Respondents' second argument is considered relative to (A.) Governor Rhodes and (B.) the remaining respondents. This argument demonstrates that the lower courts properly applied the doctrine of executive immunity when concluding that petitioners' (1.) Section 1983 and (2.) diversity causes of action failed to state claims upon which relief could be granted (ARGUMENT, pp. 22-38 *infra*). Thirdly, and independent of this Court's disposition of the executive immunity issue, respondents demonstrate that the lower courts lacked subject matter jurisdiction over petitioners' (A.) Section 1983 and (B.) diversity causes of action pursuant to the Eleventh Amendment and substantive law of Ohio. Section 5923.37, Ohio Revised Code, is (C.) shown to be unrelated to the governmental immunity of the State of Ohio. Although nominally brought against Ohio's public officials, the essential nature and effect of petitioners' actions seriously interfere with Ohio's highest

governmental duty to her citizenry (ARGUMENT, pp. 38-66 *infra*).

Further, and again independent of the above, respondents demonstrate that petitioners' allegations, challenging the propriety of the Ohio National Guard's training and weaponry, raise non-justiciable, political issues (ARGUMENT, pp. 66-74 *infra*). Finally, relative to these issues involving the propriety of the Ohio National Guard's training and weaponry, the Federal Government is shown to be an indispensable party (ARGUMENT, pp. 74-76 *infra*).

ARGUMENT

I. *The Lower Court Properly Considered the Complaints' Allegations.*

The substance of petitioners' first arguments (Sch. Br. 13, K.-M. Br. 17) is properly separated and viewed in relation to: (A.) Rule 12b(1), Fed. R. Civ. P., motions to dismiss, and (B.) Rule 12b(6), Fed. R. Civ. P., motions to dismiss. The propriety of this approach to the question is apparent from the lower appellate court's affirmance of the complaints' dismissals upon two separate and independent bases; to-wit, the federal courts' lack of subject matter jurisdiction (Eleventh Amendment), and the complaints' failure to state a claim upon which relief could be granted (Executive immunity) (Sch. Pet. 20a).[4]

[4]This Court has previously drawn the same lines of approach. In *Land v. Dollar*, 330 U.S. 731 (1946), after discussing motions to dismiss complaints for their failure to state viable causes of action, Justice Douglas continued:

> "... But when a question of the District Court's jurisdiction is raised, either by a party or by the court on its own motion [Procedural citations omitted], the court may inquire, by affidavits or otherwise, into the facts as they exist. [Case citations omitted] As stated in *Gibbs v. Buck, supra*, (307 U.S. pp. 71, 72 83 L.ed. 1115, 59 S. Ct. 725), "As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court." *Land v. Dollar, supra*, 330 U.S., 735 n., 4.

A. *Is a United States District Court required to take a complaint's allegations as true when deciding a Rule 12b(1), Fed. R. Civ. P., motion to dismiss?*

It is well-established that courts of limited jurisdiction, including the federal courts of this country, may weigh the merits of a motion placing in issue the court's subject matter jurisdiction. Rule 12h(3), Fed. R. Civ. P., endorses this basic precept:

> "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

This Court, interpreting the predecessor of Rule 12h(3), stated the controlling rule in *McNutt v. General Motors Accept. Corp.*, 298 U.S. 178, 184 (1936):

> "The trial court is not bound by the pleadings of the parties, but may, on its own motion, if led to believe that its jurisdiction is not properly invoked, 'inquire into the facts as they really exist'."

See also: *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 277-78 (1936); *Wetmore v. Rymer*, 169 U.S. 115, 120-21 (1898); 2A *Moore's Federal Practice*, Section 8.07, p. 1634 (1962); 5 C. Wright and A. Miller, *Federal Practice and Procedure*, Civil Section 1350 (1969).

It must be noted that the Krause-Miller brief's first argument makes absolutely no mention of Rule 12b(1), motions to dismiss. Although the Scheuer brief does make passing reference to Rule 12b(1) motions (Sch. Br. 13-14), the conclusions drawn therein are unfounded.

The Scheuer brief cites *Sanial v. Bossoreale*, (S.D. N.Y. 1967) 279 F. Supp. 940, for the proposition that, "If such a motion [Rule 12b(1)] involves disputed factual issues, the court *must* hold a preliminary, evidentiary hearing to resolve the issue of jurisdiction . . . (Sch. Br. 14, emphasis

added)." In the *Sanial* case, *defendants moved* for a preliminary hearing of their motion to dismiss pursuant to the provisions of Rule 12(d), Fed. R. Civ. P. There is no obligatory language in the decision compelling a federal trial court to proceed to a preliminary hearing on the jurisdictional issues raised by a Rule 12b(1), motion to dismiss.

Citing *Smith v. Sperling*, 354 U.S. 91 (1957) and *United States v. Cigarette Merchandisers' Association*, (S.D. N.Y. 1955) 18 F.R.D. 497, the Scheuer brief argues that the Rule 12b(1) motion to dismiss must be deferred until the trial on the merits if the resolution of the jurisdictional issue is tantamount to resolution of the merits (Sch. Br. 15). In *United States v. Cigarette Merchandisers' Association, supra*, as in *Sanial v. Bossoreale, supra*, defendants filed a Rule 12(d) motion. The court, *exercising its discretionary power relative to preliminary hearings involving jurisdictional issues*, denied defendants' motion since the preliminary hearing would have disclosed the government's parallel criminal case before the criminal trial.

Smith v. Sperling, supra, concerned, in part, the issue of diversity jurisdiction tested by the trial court via a preliminary hearing. This court negatively criticized the trial court for its poor discretion and wasteful exertion of energy on the preliminary jurisdictional issue in the case, concluding:

> "It seems to us that the proper course is *not* to try out the issue presented by the charges of wrong doing but to determine the issue of antagonism [controlling the jurisdictional issue of diversity in the case] *on the face of the pleadings and by the nature of the controversy.*" (345 U.S., 96; emphasis added)

Respondents agree with the lessons taught by these cases; specifically, the convening of preliminary hearings to

determine the propriety of subject matter jurisdictional attacks is within the sound discretion of the trial court, and that, in the first instance, issues of subject matter jurisdiction are to be determined from the face of the pleadings and by the nature of the controversy.

Parenthetically, and as a harbinger of respondents' later argument, respondents did not move for a preliminary hearing in the trial court on the jurisdictional issues since this procedure would have mooted their Eleventh Amendment argument. [Petitioners' rationale for not requesting a Rule 12(d) preliminary hearing is not known—certainly the option was available to them.] It is judicially recognized that petitioners' actions would interfere with Ohio's governmental functions as a result of Ohio's public officials being exposed to the harassment and inevitable hazards inherent in public trial, whether the trial be a preliminary hearing of the jurisdictional issues or the ultimate trial of fact. If a jurisdictional hearing had been conducted, the harm to Ohio would be realized; respondents' Eleventh Amendment position becoming dormant.

Thus, the lower courts were empowered and properly "inquire [d] into the facts as they really exist," exercising sound judicial discretion. The appropriateness of the lower courts' conclusion is hereinafter considered (ARGUMENT, pp. 38-66 *infra*).

B. *Is a United States District Court required to take a complaint's allegations as true when deciding a Rule 12b(6), Fed. R. Civ. P., motion to dismiss?*

The answer to the above posed question is contingent upon the realities before the court in each case. It is well established that a pleader cannot rely solely upon his complaint's allegations in the face of contrary evidence presented pursuant to Rule 56, Fed. R. Civ. P. It is also established that allegations amounting to conclusions of

law and/or unwarranted deductions of fact need not be accepted as true. Finally, federal trial courts are not bound to accept as true allegations at odds with facts judicially known to them.

Rule 12b, Fed. R. Civ. P., provides that when presented a Rule 12b(6), motion to dismiss, trial courts are to treat evidence introduced therewith in accordance with the procedures of the summary judgment provision. Rule 56(e) states, in no uncertain terms:

> " . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

In the cases at bar, there is no question but that relevant Executive Proclamations were appended to respondents' motions to dismiss.

Initially, it is important to note that the Proclamations' substance is not contrary to the allegations of petitioners. These public documents established, *inter alia*, (1) that a condition of insurrection, rampage, and public danger existed at Kent State University, May 4, 1970; (2) that in response thereto, the Ohio National Guard, including respondents, were ordered by Governor Rhodes to take that action necessary to protect life and property on the campus and restore order thereto; and (3) that the call-up of the Ohio National Guard was accomplished pursuant to the law of Ohio. (Sch. Pet. 3a; 23a-26a).

Assuming petitioners argue that the Proclamations are in some manner offensive to their allegations, petitioners

lodged no contrary evidence in the trial court, electing instead to stand upon the allegations of their complaints. Consequently, the factual realities embodied in the Executive Proclamations were properly accepted as true by the trial court notwithstanding the allegations of the various complaints.

Secondly, the federal courts have uniformly held that Rule 12b(6), motions to dismiss admit all well-pleaded factual allegations; however, conclusions of law and/or unwarranted deductions of fact are not admitted. See, *e.g.*, *Newport News S. & Dry Dock Co. v. Schauffler*, 303 U.S. 54, 57 (1938); *Ryan v. Coggin*, (C.A. 10th 1957) 245 F.2d 54, 57; *Hiland Dairy, Inc. v. Kroger Co.*, (C.A. 8th 1968) 402 F.2d 968, 973, *cert. denied* 395 U.S. 961 (1968); *International Bk. of M. v. Banco de Economics y Prestamos*, 55 F.R.D. 180, 186 (1972); 2A *Moore's Federal Practice*, §12.08, pp. 2266-69 (1972). Petitioners' complaints are saturated with both conclusions of law and unwarranted deductions of fact.

In order not to belabor the point, the First Cause of Action contained in the Krause Amended Complaint is considered as a fair example of the pleadings presented to the trial court by the petitioners (K.-M. Pet. 47-50):

> "At all times herein mentioned all *defendants acted and conspired* under color of statutes, ordinances, regulations, customs and usages of the State of Ohio." (Emphasis added)
>
> "Defendants ordered troops which they knew were equipped with guns loaded with live ammunition onto the Campus of Kent State University at a time when:
>
> > "*Defendants knew there was no cause, or insufficient cause, for sending armed troops at said time into said place;*

> *"Defendants knew said troops were not properly trained in the correct and reasonable use of loaded weapons when in the presence of civilians not similarly armed;* and
>
> *"Defendants knew that the presence of such troops, so improperly trained, and so armed under the circumstances created an unreasonable danger on the campus at Kent State University,* creating an eminent risk of injury and death to all students then on the campus, including plaintiff's decedent, Allison Krause." (Emphasis added)
>
> *"Suddenly and without warning and without cause or justification,* National Guard troops fired live ammunition at a large group of students and people, *intentionally, wilfully, wantonly and maliciously* disregarding the lives and safety of students, spectators, passers-by * * * including Allison Krause, who was wounded by a bullet fired by a weapon of a national guardsman, ..." (Emphasis added)
>
> "All acts herein mentioned *were done individually and in conspiracy* by these defendants and by other unknown persons *with the specific intent of depriving plaintiff and plaintiff's decedent of their rights* to Due Process of Law and to Equal Protection of the Laws, and these acts were all done by all defendants and other unknown persons under color of statutes, ordinances, regulations, customs and usages of the State of Ohio." (Emphasis added)

Pleadings such as these, replete with conclusions of law and unwarranted deductions of fact, compelled Judge O'Sullivan to file his *concurring opinion* in the court of appeals. (Sch. Pet. 27a-31a). As hereinafter demonstrated, pleadings such as these would directly affect the efficiency of Ohio's governmental functions if these suits were de-

termined to be within the federal courts' jurisdiction (ARGUMENT, pp. 38-66 *infra*).

Finally, the federal courts need not accept as true a complaint's allegations in conflict with facts judicially known to the court. *Nev.-Cal. Electrical Securities Co. v. Imperial Irr. District*, (C.A. 9th 1936), 85 F.2d 886, 904, *cert. denied*, 300 U.S. 662 (1937); *Interstate Nat. Gas Co. v. Southern California Gas Co.*, (C.A. 9th 1953) 209 F.2d 380, 384; *Blackburn v. Fisk University*, (C.A. 6th 1971) 443 F.2d 121, 123; Barron & Holzoff, 1A *Federal Practice and Procedure*, §350, p. 330 (Wright ed. 1960). A succint definition of the evidentiary rule of judicial notice is found in the case of *Porter v. Sunshine Packing Corporation*, (W.D. Pa. 1948) 81 F. Supp. 566:

> "Judicial knowledge may be defined as the cognizance of certain facts which a judge under the rules of legal procedure or otherwise may properly take or act upon without proof because they are already known to him or because of that knowledge which a judge has, or is assumed to have, or merely another way of expression that the usual forms of evidence will be dispensed with if the fact is one of such public concern or notoriety which is known generally by all well-informed persons. As has been said, judges will not shut their minds to truths that all others can see and understand." (81 F. Supp., 575; omitting reference citations.)

The existence of inexcusable destruction and civil rampage present in Kent, Ohio, May 4, 1970, are matters of public notoriety and historical documentation. As such, these conditions are within the ambit of judicial notice. See, *e.g.*, 8 *Cyc. Fed. Proc.* §§26.226, 26.247 (3rd ed. 1968).

The propriety of the lower courts' judgment dismissing petitioners' complaints pursuant to Rule 12b(6), Fed. R. Civ. P., is next considered.

II. *The Lower Court Properly Dismissed the Complaints for Their Failure to State a Claim Upon Which Relief Could Be Granted.*

The question as presented by both the Scheuer brief (Sch. Br. 4) and the Krause-Miller brief (K.-M. Br. 7) is premised upon a conclusion never drawn by the lower court. The court of appeals did not hold that all respondents possessed absolute executive immunity to suit. Rather, the majority concluded that, under the facts at bar, Governor Rhodes had *absolute* immunity (Sch. Pet. 12a) and that the remaining respondents were protected by a *qualified* immunity to petitioners' Section 1983 causes of action (Sch. Pet. 20a). Thus, the immunity of the various respondents must be considered in the light of this distinction.

Before considering the specific issues presented, respondents respectfully call this Court's attention to the uncontradicted factual realities before the lower courts (STATEMENT OF THE CASE, paras, 1-5, pp. 11-13 *supra*).

A. *Respondent, Governor James Rhodes*

1. Under the facts of this case, does the Governor of the State of Ohio possess *unqualified* executive immunity for his discretionary acts *vis-à-vis* a 42 U.S.C. Section 1983 cause of action?

It is firmly entrenched in judicial precedent that the executive's decision to call out the militia is a matter within his sole discretion and not subject to judicial review. As early as 1827, this Court stated:

> "The power thus confided by Congress to the President is doubtless of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. . . . If it be a limited power, the question arises, by whom is the exi-

gency to be judged of and decided? . . . We are all of opinion that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons." *Martin v. Mott*, 25 U.S. (12 Wheat.) 537,540 (1827)

Again, in 1849, this Court, speaking through Chief Justice Taney, held:

"After the President has acted and called out the militia, is a circuit court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented a majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States or the government, which the President was endeavoring to maintain. If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order. Yet if this right does not reside in the courts when the conflict is raging, if the judicial power is at that time bound to follow the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is restored, punish as offenses and crimes the acts which it before recognized, and was bound to recognize, as lawful." *Luther v. Borden*, 48 U.S. (7 How.) 581,599 (1849).

This Court has consistently followed the precedent established in *Mott* and *Luther* when dealing with the actions of a Governor[5] in calling out the militia. *Moyer v.*

[5]The power of the Governor of the State of Ohio to call out the militia is likewise constitutionally provided under Article IX, Section 4, Ohio Constitution. See: *infra* note 15.

Peabody, 212 U.S. 78 (1909); *Sterling v. Constantine*, 287 U.S. 378 (1932).

Moyer was an action for false imprisonment brought against the former governor of Colorado, the former adjutant general of the Colorado national guard, and a captain of a company of the national guard. The following statement of Justice Holmes is crucial to the issue of immunity:

> "As no one would deny that there was immunity for ordering a company to fire upon a mob in insurrection, and that a state law authorizing the governor to deprive citizens of life under such circumstances was consistent with the 14th Amendment, we are of opinion that the same is true of a law authorizing by implication what was done in this case." 212 U.S. 78, 85-86 (1909)

Petitioners cite *Sterling v. Constantine, supra*, as being, ". . . the best possible expression of their position on the subject of executive immunity" (K.-M. Br. 67). It is sufficient to say that *Sterling* has little, if any, relevance to this issue. This Court, in *Sterling*, approved *Mott, Luther* and *Moyer*, but distinguished them on the ground that Governor Sterling's decision to have the military enforce limits on state oil production came *after* a federal district court had granted a temporary restraining order enjoining the state's oil quota.

The kind of *ex post facto* review prohibited by *Mott, Luther*, and *Moyer* was not at issue in *Sterling* for the federal district court had exercised jurisdiction in matters involving the "exigency" *prior* to Governor Sterling's assertion of his military powers. Lower federal courts, when faced directly with Section 1983 causes of action against a Governor, have reached the same conclusion as the lower court herein; the Governor had absolute im-

munity. See: *Martone v. McKeithen*, (5th Cir. 1969) 413 F.2d 1373.

2. Under the facts of this case, does the Governor of the State of Ohio possess *unqualified* executive immunity for his discretionary acts *vis-à-vis* a wrongful death action brought under diversity jurisdiction?

The law of Ohio is well settled that, ". . . a public officer cannot be held accountable for any act done while performing a function which requires the exercise of discretion." *Reckman v. Keiter*, 109 Ohio App. 81, 164 N.E. 2d 448 at 458 (1959). See also: *Ramsey v. Riley*, 13 Ohio Rep. 157 (1844); *Stewart v. Southard*, 17 Ohio Rep. 402 (1848); *Gregory v. Small*, 39 Ohio St. 346 (1883); *Thomas v. Wilton*, 40 Ohio St. 516 (1884); *Wierzbicki v. Carmichael*, 118 Ohio App. 239, 187 N.E.2d 184 (1963). Respondent Rhodes was the highest public officer in the State of Ohio; consequently, the lower court was correct in holding him immune to petitioners' wrongful death actions brought under diversity jurisdiction.

B. *The Remaining Respondents.*

1. Under the facts of this case, do the President of Kent State University, the Adjutant General of the State of Ohio, the Assistant Adjutant General of the State of Ohio, and the named officers of the State of Ohio's organized Militia possess *qualified* executive immunity *vis-à-vis* a 42 U.S.C. Section 1983 cause of action?

Petitioners contend that the lower court's executive immunity determination, ". . . has been rejected by the *great majority* of lower courts which have considered the issue" (Sch. Br. 28, emphasis added) and is a "new executive immunity" (K.-M. Br. 79) which should be rejected

by this Court. In support of this contention, petitioners cite: *Carter v. Carlson*, (D.C. Cir. 1971) 447 F.2d 358, *rev'd on other grounds*, 409 U.S. 418 (1973); *Jobson v. Heine*, (2nd Cir. 1966) 355 F.2d 129; *Birnbaum v. Trussell*, (2nd Cir. 1965) 347 F.2d 86; *Roberts v. Williams*, (5th Cir. 1971) 456 F.2d 819, *cert. denied*, 404 U.S. 866 (1971), addendum 456 F.2d 834; *Jones v. Perrigan*, (6th Cir. 1972) 459 F.2d 81; *McLaughlin v. Tilendis*, (7th Cir. 1968) 398 F.2d 287. *Carter*, *Jobson*, *Roberts*, *Jones*, and *McLaughlin* all recognize the existence of executive immunity as a defense to a Section 1983 action but would apply the immunity sparingly. Moreover, it must be noted that *all* of these cases can be cited in support of the lower court's executive immunity determination as they endorse a case by case analysis.

Petitioners cite a passage from *Birnbaum v. Trussel*, *supra*, (a Section 1983 action by a doctor against commissioners of city department of hospitals and union president for dismissal on grounds of *racial prejudice)* as being the universally accepted rationale for the rejection of executive immunity against a Section 1983 action. (Sch. Br. 28) *Birnbaum* is readily distinguishable from the cases at bar. *Birnbaum* was brought on the grounds of racial discrimination necessarily involving divergent policy considerations. See, Comment: *Civil Liability of Subordinate State Officials Under the Federal Civil Rights Acts and the Doctrine of Official Immunity*, 44 Calif. L. Rev. 887 (1956); also, the concurring opinion of Senior Circuit Judge O'Sullivan (Sch. Pet. 27a).

This distinction can be further explained by the following passage from Justice Brennan's unanimous opinion in *District of Columbia v. Carter*, U.S. , 34 L.Ed.2d 613 (1973):

> "Thus, in the final analysis, [Section] 1 of the 1871 Act may be viewed as an effort 'to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.'" (citation omitted) 34 L.Ed.2d, 623.

Thus, *Birnbaum* can be viewed as a classic Section 1983 case for, "by reason of [racial] prejudice", the plaintiff was denied his right to work by a state agency. Similarly, petitioners cite *Ex parte Virginia*, 100 U.S. 339 (1880), apparently to show an instance in which this Court refused to extend judicial immunity to a magistrate (K.-M. Br. 72). Although *Ex parte Virginia* is readily distinguishable on the grounds that the act (refusing to allow negroes on juries) was ministerial, rather than discretionary, it is a clear example of an individual representing a State in some capacity who, "by reason of [racial] prejudice", refused to accord a citizen his Fourteenth Amendment rights.

The causes of action in *Ex parte Virginia* and *Birnbaum* would not have existed without the passage of the Civil Rights Act of 1871, and there is sound policy foundation for not allowing immunity to defeat claims of racial discrimination. Claims such as those presently before this Court, alleging no racial discrimination, are governed by different policy considerations. Petitioners, by bringing Section 1983 actions in combination with wrongful death actions, are attempting to have this Court enter the fray and negate the decisions of the Ohio courts which would hold respondents immune to petitioners' wrongful death actions. *Ramsey v. Riley, supra; Stewart v. Southard, su-*

pra; Gregory v. Small, supra; Thomas v. Wilton, supra; Reckman v. Keiter, supra; Wierzbicki v. Carmichael, supra.

Petitioners, when stating that the *great majority* of lower courts refuse to allow immunity against a Section 1983 action (Sch. Br. 28), and that the lower court, in their decision herein, created a new executive immunity (K.-M. Br. 79), are ignoring a consistent line of lower court decisions holding state governmental officials immune to Section 1983 causes of action for discretionary acts done within the scope of their authority. See, *e.g., Pierson v. Ray,* 386 U.S. 547 (1967); *Tenney v. Brandhove,* 341 U.S. 367 (1951); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* (2nd Cir. 1972) 456 F.2d 1339; *Anderson v. Nosser,* (5th Cir. 1971) 438 F.2d 183; *Martone v. McKeithen,* (5th Cir. 1969) 413 F.2d 1373; *Bradford Audio Corporation v. Pious,* (2nd Cir. 1968) 392 F.2d 67; *Silver v. Dickson,* (9th Cir. 1968) 403 F.2d 642; *Lumbermens Mutual Casualty Company v. Rhodes,* (10th Cir. 1968) 403 F.2d 2, *cert. denied,* 394 U.S. 965 (1969); *Franklin v. Meredith,* (10th Cir. 1967) 386 F.2d 958; *Norton v. McShane,* (5th Cir. 1964) 332 F.2d 855, *cert. denied,* 380 U.S. 981 (1965); *Hoffman v. Halden,* (9th Cir. 1959) 268 F.2d 280. The policy considerations calling for immunity to be given officials for their discretionary acts are defined in the previous decisions of this Court and lower federal appellate courts. See, *e.g., Barr v. Matteo,* 360 U.S. 564 (1959); *Howard v. Lyons,* 360 U.S. 593 (1959); *Dalehite v. United States,* 346 U.S. 15 (1953); *Spalding v. Vilas,* 161 U.S. 483 (1896); *Wilkes v. Dinsman,* 48 U.S. (7 How.) 618 (1849); *Kendall v. Stokes,* 44 U.S. (3 How.) 506 (1845); *Sittenfeld v. Tobriner,* (D.C. Cir. 1972) 459 F.2d 1137; *David v. Cohen,* (D.C. Cir. 1969) 407 F.2d 1268; *Sulger v. Pochyla,* (9th Cir. 1968) 397 F.2d 173, *cert. denied,* 393 U.S. 981 (1968); *Scherer v. Brennan,* (7th Cir. 1967) 379 F.2d 609, *cert. denied,* 389 U.S. 1021

(1967); *Blitz v. Boog*, (2nd Cir. 1964) 328 F.2d 596, *cert. denied*, 379 U.S. 855 (1965); *Brownfield v. Landon*, (D.C. Cir. 1962) 307 F.2d 389, *cert denied*, 371 U.S. 924 (1962); *Ove Gustavsson Contracting Co. v. Floete*, (2nd Cir. 1962) 299 F.2d 655, *cert. denied*, 374 U.S. 287 (1963); *Gregoire v. Biddle*, (2nd Cir. 1949) 177 F.2d 579, *cert. denied*, 339 U.S. 949 (1950); *Jones v. Kennedy*, (D.C. Cir. 1941) 121 F.2d 40, *cert denied*, 314 U.S. 665 (1941); *Cooper v. O'Conner*, (D.C. Cir. 1938) 99 F.2d 135, *cert. denied*, 305 U.S. 643 (1938); *Mellon v. Brewer*, (D.C. Cir. 1927) 18 F.2d 168. These cases endorse the basic policy determination that governmental officials must not be hampered by the fear of ill-founded, vindictive law suits.

Though the above citations by no means purport to be a complete list of cases recognizing tort immunity for the discretionary acts of governmental officials, the lower court's finding that the complaints failed to state a claim upon which relief could be granted (*i.e.*, the respondents were immune to suits under the facts at bar) can hardly be characterized as a "new extension" of immunity in the face of the "great majority" of lower court decisions. Additionally, petitioners argue that the lower court's immunity determination, giving respondents immunity to petitioners' Section 1983 causes of action, was incorrect for: 1) there was no historical basis for executive immunity prior to the passage of the Civil Rights Act of 1871 (42 U.S.C. Section 1983) (Sch. Br. 31); and 2) there was historical precedent for legislative and judicial immunity, and Section 1983 must have been intended to apply only to acts of the executive (K.-M. 75, Sch. Br. 31).

Contrary to petitioners' bold statement that, "Executive immunity had *no* common law recognition in the United States," (Sch. Br. 31), this Court, speaking through Chief Justice Taney, wrote in *Kendall v. Stokes*, 44 U.S. (3

How.) 506 (1845) (a damage action against Postmaster General for illegally and maliciously refusing to pay a sum of money to which plaintiff was lawfully entitled):

> "But a public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion: even although an individual may suffer by his mistake. A contrary principle would, indeed, be pregnant with the greatest mischiefs. It is unnecessary, we think, to refer to the many cases by which this doctrine has been established. It was fully recognized in the case of *Gidley, Exec. of Holland, v. Ld. Palmerston*[6] (J. B. Moore, 91; 3 B. & B., 275)" 44 U.S. (3 How.) 506, 512 (1845) (Footnote added).

Similarly, in *Wilkes v. Dinsman*, 48 U.S. (7 How.) 618 (1849), this Court, in reversing and remanding judgment for a marine in an action for assault and battery and false imprisonment against his commanding officer said:

> " 'It would, in our opinion, be opposed to all the principles of law, justice, and sound policy, to hold that officers called upon to exercise their

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[6]The case of *Gidley, Executor of Holland v. Lord Palmerston*, 3 B. & B. 275 (1822) involved an action by a retired clerk of the war office against the secretary of war to collect a retired allowance to which he was lawfully entitled. On the issue of immunity, the court stated:

> ". . . on principles of public policy, an action will not lie against persons acting in a public character and situation, which, from their very nature, would expose them to an infinite multiplicity of actions, that is, to actions at the instance of any person who might suppose himself aggrieved: and though it is to be presumed that actions improperly brought would fail, and it may be said that actions properly brought should succeed; yet, the very liability to an unlimited multiplicity of suits, would, in all probability, prevent any proper or prudent person from accepting a public situation at the hazard of such peril to himself." 3 B. & B. 275, 286-87 (1822).

deliberate judgments are answerable for a mistake in law, either civilly or criminally, when their motives are pure, and untainted with fraud or malice.' " 48 U.S. (7 How.) 618, 637 (1849).

Kendall and *Wilkes*, prove that the doctrine of executive immunity, at least for discretionary acts, was a viable one recognized and approved by this Court prior to the 1871 passage of the Civil Rights Act. In *Spalding v. Vilas*, 161 U.S. 483 (1896), this Court put an end to any speculation regarding the existence of executive immunity in the United States. The Court stated the proposition thusly:

> "In exercising the functions of his office, the head of an executive department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may at any time become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as intrusted to the executive branch of the government, if he were subjected to any such restraint. He may have legal authority to act, but he may have such large discretion in the premises that it will not always be his absolute duty to exercise the authority with which he is invested. But if he acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals." 161 U.S. 483, 498-99 (1896) See also: *Barr v. Matteo*, 360 U.S. 564, 570-71 (1959).

The most important lesson to be gained from the review of executive immunity cases is that even though *Kendall* and *Wilkes* were not cited in *Spalding*, the *Spalding* Court, faced with the always present conflict between the protection of the individual citizen against pecuniary damage

caused by an agent of the government and the protection of the public interest by shielding responsible officials from ill-founded damage action brought on account of action taken in the exercise of their official responsibilities, reached the identical conclusion by resolving the conflict favor of the governmental officer. The same principles and policy considerations were further refined and expanded in landmark cases of *Gregoire v. Biddle*, (2nd Cir. 1949) 177 F.2d 579, *cert. denied*, 339 U.S. 949 (1950) and *Barr v. Matteo*,[7] 360 U.S. 564 (1959).

Despite the fact that *Gregoire* had been cited with approval in *Barr* and *Garrison v. Louisiana*, 379 U.S. 64 (1964), petitioners attempt to distinguish *Gregoire* on the grounds that it was not a Section 1983 case and negate its impact because it has allegedly been criticized. (K.-M. Br. 76-79) *Gregoire*, however, was cited with approval in *Norton v. McShane, supra; Martone v. McKeithen, supra;* and *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc.*, (2nd Cir. 1972) 456 F.2d 1339, all of which were Section 1983 cases.

To show criticism of *Gregoire*, petitioners cite *Beauregarde v. Wingard*, (S.D. Cal. 1964) 230 F. Supp. 167; *Kelley v. Dunne*, (1st Cir. 1965) 344 F.2d 129; and *S & S*

[7]Judge Learned Hand's resolution of difficult public policy considerations is often quoted to show the justification for the application of immunity. The *Gregoire* reasoning was cited at length in *Barr, supra*. The best known passage is:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to t e inevita-

(footnote continued)

Logging Co. v. Barker, (9th Cir. 1966) 366 F.2d 617. *Beauregard* was a Section 1983 case and cited *Gregoire* at length (See: 230 F. Supp., 172-73) without criticism. *Kelley* was not a Section 1983 case and did not reject the viability of *Gregoire* but held that *Gregoire's* application was not warranted under the facts of *Kelley*. *S & S Logging Co.* was not a Section 1983 case but rather an antitrust action brought under the Clayton Act. *Gregoire* was approved and followed by the majority opinion.

Because of the obvious prejudicial impact of *Tenney v. Brandhove*, 341 U.S. 367 (1951), (holding that Congress, in enacting the Civil Rights Statutes, did not intend to abolish legislative immunity) and *Pierson v. Ray*, 386 U.S. 547 (1967) (holding that Congress, in enacting the Civil Rights Statutes, did not intend to abolish judicial immunity), petitioners are forced to argue that the Civil Rights Act of 1871 was intended *only* to reach actions of the executive branch of state government. (K.-M. Br. 75, Sch. Br. 31). Such a conclusion is totally without merit. Section 1983 clearly makes liable "every person" who under color of law deprives another person of his civil rights. Had Congress intended the Act to apply solely to executive actions, it could have easily drafted the Act to

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ble danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." 177 F.2d 579, 581.

reflect such intention. This Court, in determining that members of the legislature and the judiciary are immune to actions brought under the Civil Rights Act, made some extremely difficult policy decisions having incredible impact on the very functioning of our system of government. This Court is again faced with a difficult question—should the Governor and Ohio's highest ranking military officers be immune to actions brought pursuant to Section 1983 for acts done within their discretion? The solution to this question axiomatically will have tremendous impact upon both the federal government and all Fifty States regardless of its resolution. If resolved in favor of the petitioners, respondents and those similarly circumstanced in the future would find themselves subject to the whims of a vindictive plaintiff's pen, while the judge who rules upon their cases and the legislator who creates the laws under which they act would be immune.

While many courts have attempted to resolve the question, respondents submit that the approach taken by the 9th Circuit in *Hoffman v. Halden, supra,* is perhaps the most rational:

> "Since these Civil Rights actions lie in the federal courts and defendants are usually state officials, there are involved 'delicate state-federal relationships,' *Francis v. Lyman,* 1 Cir., 1954, 216 F.2d 583, 588."
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> "In *Stefanelli v. Minard,* 1951, 342 U.S. 117, at pages 121-125, 72 S. Ct. 118, at page 122, 96 L. Ed. 138, Justice Frankfurter after pointing out the 'far-flung and undefined range' of questions of procedural due process under the Civil Rights Acts, (342 U.S. at page 123, 72 S. Ct. at page 122) concludes with the enigmatic statement, 'To suggest these difficulties is to recognize their solution.' (342 U.S. at page 124, 72 S. Ct. at page 122)."

"To protect this 'delicate state-federal relationship' some limits must be placed on the otherwise limitless sweep of the Civil Rights Act."

"A broad holding that all state officials enjoyed immunity would be an improper approach. If courts held that all state officials had immunity from liability under Civil Rights actions for all acts done or committed within the ostensible scope of their authority, this would practically constitute a judicial repeal of the Civil Rights Act. Repeal is the responsibility of Congress, not the courts."

"The approach of granting immunity to government officials for discretionary acts done within the scope of their authority, seems a proper one. Without the presence of a particular discriminatory intent they have no liability in any event. This approach says we will not inquire, subjectively—into their state of mind—where they are exercising a discretionary function." 268 F.2d 280, 299-300 (9th Cir. 1959).[8]

None of the respondents herein are alleged to have fired any shots fatal to petitioner's decedents. It is a well established principle of law that a public officer is not responsible for the negligence of subagents or servants properly employed by him in the discharge of his official duties.[9] The crux of petitioners Section 1983 causes of action is that Respondent Rhodes should not have called out the national guard and the other respondents should have disobeyed the orders of their Commander-in-Chief and refused to appear at Kent State. With such precedents as *Mott*, *Luther*, *Moyer*, *Spalding*, *Gregoire*, and *Barr* holding

[8] *Infra* note 15

[9] *Robertson v. Sichel*, 127 U.S. 507 (1887); *German Bank v. United States*, 148 U.S. 573 (1893); *Jones v. Kennedy*, (D.C. Cir. 1941) 121 F.2d 40, *cert. denied*, 314 U.S. 665 (1941); *Adams v Pate*, (7th Cir. 1971) 445 F.2d 105; *Dunham v. Crosby*, (1st Cir. 1970) 435 F.2d 1177.

to the contrary, this Court would be hard pressed to conclude that the lower court erred in its executive immunity determination.

2. Under the facts of this case, do the President of Kent State University, the Adjutant General of the State of Ohio, the Assistant Adjutant General of the State of Ohio, and the named officers of the State of Ohio's organized Militia possess *qualified* executive immunity *vis-à-vis* a wrongful death action brought under diversity jurisdiction?

Petitioners, in their complaints, assert a common law wrongful death cause of action apparently based upon a violation of Ohio Revised Code, Section 5923.37.[10] Assuming, *arguendo*, that the trial court had subject matter jurisdiction over petitioners' diversity causes of action, still their complaints failed to state a claim upon which relief could be granted. To be applicable, Section 5923.37 requires that the wrongdoer be at the scene of the disorder and that his conduct be willful or wanton.

The uncontradicted affidavit of Respondent Del Corso attests to the fact that he was not at Kent State when petitioners' alleged causes of action arose and, therefore, he does not come within the purview of Section 5923.37. Likewise, the affidavit of Respondent Canterbury affirms that he did nothing to cause the fatal shots to be fired and, therefore, he is also outside this section. Further, Respondent White, as President of Kent State University, is certainly not a "member of the organized Militia".

Petitioners' complaints evidence that none of the re-

[10]Section 5923.37:

"When a member of the organized Militia is ordered to duty by State authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct."

spondents at bar fired the fatal shots. Members of the Ohio National Guard were agents of the State and not agents of the respondents. *Maryland v. United States*, 381 U.S. 41 (1965). Moreover, even if the members of the national guard were agents of the respondents, there is still no vicarious liability under a Section 1983 action. *Adams v. Pate*, (7th Cir. 1971) 445 F.2d 105; *Dunham v. Crosby*, (1st Cir. 1970) 435 F.2d 1177; II Harper & James, *Law of Torts*, §29.8, pp. 1633-34. The question of whether the actions of those who fired the shots were willful or wanton is clearly foreign to the issues presently before this Court.

The lower courts resolved the diversity question on the ground that the suits are barred by the Eleventh Amendment and Article I, Section 16 of the Ohio Constitution. Hence, any decision of the lower court with regard to Section 5923.37 would have been dicta and not determinative of the cases. It cannot be over emphasized that petitioners are not presenting a federal question by challenging the constitutionality of Section 5923.37 as repugnant to the United States Constitution, nor are petitioners challenging a lower court's interpretation of the statute as being in conflict with Ohio law. Although there are presently pending numerous Ohio state court wrongful death and personal injury actions arising out of the Kent State tragedy, no Ohio court has yet had the opportunity to interpret Section 5923.37. Surely, this Court is not the proper forum for this section's introduction to judicial scrutiny.[11]

[11]It is pertinent to note that petitioners attempted to distinguish *Moyer v. Peabody, supra*, on the grounds that the existence of a state of insurrection in the case presently before this Court is disputed (K.-M. Br. 64-66). Yet, petitioners devote an entire ARGUMENT (K.-M. Br., ARGUMENT IV, 80-83) to the proposition that they have a diversity cause of action based upon Section 5923.37, a necessary element of which is a showing that the wrongdoer was a *member of the organized Militia ordered to duty by State authority during a time of public danger.*

Finally, the law of Ohio is established that a public official cannot be held accountable for any act done while performing a function which requires the exercise of discretion. *Ramsey v. Riley*, 13 Ohio Rep. 157 (1844); *Stewart v. Southard*, 17 Ohio Rep. 402 (1848); *Gregory v. Small*, 39 Ohio St. 346 (1883); *Thomas v. Wilton*, 40 Ohio St. 516 (1884); *Reckman v. Keiter*, 109 Ohio App. 81, 164 N.E.2d 448 (1959); *Wierzbicki v. Carmichael*, 118 Ohio App. 239, 187 N.E.2d 184 (1963). Consequently, the lower court had a very solid legal foundation when it dismissed petitioners' diversity causes of action on the ground that they failed to state a claim upon which relief could be granted.

III. *The Trial Court Lacked Subject Matter Jurisdiction.*

A. *Petitioners' Title 42 U.S.C. §1983, causes of action; Title 28 U.S.C. §§1331, 1343.*

The federal courts' lack of subject matter jurisdiction is, in most respects, unrelated to petitioners' failure to state a claim upon which relief can be granted. However, if this Court should determine the doctrine of executive immunity inapplicable to any one of the respondents, the trial court's lack of subject matter jurisdiction becomes even more compelling. This functional relationship is hereinafter demonstrated.

Although the immunity of the Federal Government is predicated upon the common law [See, *e.g.*, *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 257, 293 (1821); *Dalehite v. United States*, 346 U.S. 15, 30 (1952)], and the immunity of the States to federal suit is established by the Federal Constitution (U.S. Const. amend. XI), traditionally these immunities are treated synonymously by this

Court[12] and the commentators.[13] If either immunity were to be accorded priority, it would surely be the immunity of the States to federal suit found in the Supreme Law of the Land and inextricably affecting federalism. *Employees v. Missouri Public Health Dept.*, U.S. , 36 L.ed2d 251, 257, 262 (1973).

The Eleventh Amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

Notwithstanding a literal reading of the Eleventh Amendment, there is little question but that the Amendment prohibits federal courts from exercising jurisdiction over actions brought against an unconsenting State by its own citizens. *Hans v. Louisiana*, 134 U.S. 1 (1889); *Duhne v. New Jersey*, 251 U.S. 311 (1919); *Parden v. Terminal R. Co.*, 377 U.S. 184 (1964); *Employees v. Missouri Public Health Dept.*, U.S. , 36 L.Ed.2d 251 (1973).

The Eleventh Amendment, being the Supreme Law of the Land, cannot be diminished by Congressional enactment. *Hans v. Louisiana, supra*, 134 U.S., 10; *Smith v. Reeves*, 178 U.S. 436, 447-49 (1899); *Ex parte New York*, 256 U.S. 490, 497-98 (1920); *Parden v. Terminal R. Co., supra*, 377 U.S., 186. Consequently, Congress could not and

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[12]For instance, in *Dugan v. Rank*, 372 U.S. 609 (1963), a case involving the immunity of the Federal Government, this Court cited *Re New York*, 256 U.S. 490 (1921), an Eleventh Amendment case, to determine whether that action was in effect against the Federal Government (*Dugan v. Rank, supra*, 372 U.S., 620). *See, Tindal v. Wesley*, 167 U.S. 204, 213 (1897).

[13]See, e.g., Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 23 (1963); Annot., 12 L.ed2d 1110, 1113 (1964).

did not expose the States to federal jurisdiction by enacting Section 1983 and the corollary jurisdictional provisions, 28 U.S.C. §§1331, 1343. *Monroe v. Pape*, 365 U.S. 167 (1961); *Egan v. City of Aurora*, 365 U.S. 514 (1961); *Sires v. Cole*, (9th Cir. 1963) 320 F.2d877. Petitioners' historical analyses are not to the contrary.

Further, it is established that the Eleventh Amendment cannot be avoided by nominally naming, as defendant, a State's public officials when the essential nature and effect of the lawsuit affects the State. *Ford Motor Co. v. Treasury Department*, 323 U.S. 459, 464 (1944); *Ex parte New York, supra*, 256 U.S., 500; *Re Ayers*, 123 U.S. 443, 492 (1887).[14] The formulation of guidelines for determining if the nature and effect of a lawsuit affects the State has been previously characterized a "Procrustean task" by this Court. *Malone v. Bowdoin*, 369 U.S. 643, 646 (1962). Nevertheless, certain rules have been defined and control the issue as presently posed.

This Court has stated the general rule that a public official may be sued individually if the acts complained of were outside the official's statutory authority and/or if the statutory authority under which the official acted, or is about to act, is challenged as repugnant to the Federal Constitution. *Yearsley v. W. A. Ross Construction Co.*, 309 U.S. 18, 21 (1939); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 692 (1948); *Malone v. Bowdoin, supra*, 369 U.S., 646-47; *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963); *State of Hawaii v. Gordon*, 373 U.S. 57, 58 (1963). If the lawsuit is predicated upon a public offi-

[14]Chief Justice Marshall in *Osbourn v. United States Bank*, 22 U.S. (9 Wheat.) 204 (1824), first held that the Eleventh Amendment only barred suits to which a State was a party of record. This formalistic approach was later abandoned in *Governor v. Madrazo*, 26 U.S. (1 Pet.) 73 (1828), and finally repudiated in *Re Ayers*, 123 U.S. 443, 487-92 (1887).

cial's *ultra vires* acts, the plaintiff is required to set forth the statutory limitation upon which his lawsuit relies. *Larson v. Domestic and Foreign Commerce Corp., supra,* 337 U.S., 690; *Malone v. Bowdoin, supra,* 369 U.S., 648 n. 9. The complaints at bar not only fail to set forth a specific statutory limitation but also fail to allege that any Ohio statute was violated. If such a contention had been made, it is clear that the allegation would have been frivolous.[15] Further, the statutory warrant authorizing

[15]Respondents not only acted *pursuant* to the Ohio statutes May 4, 1970, but further, the unchallenged Ohio statutory law *obligated* respondents to act. Specifically, the Ohio Constitution places upon the Governor of Ohio the responsibility of Commander-in-Chief of the Ohio National Guard (Ohio Const. art. III, sec. 10) and the obligation of appointing the Adjutant General and Assistant Adjutant General of the state's Militia (Ohio Const. art. IX, sec. 3). Further, the duty of appointing line and staff officers and ordering them to service when necessary "to execute the laws of the state, to suppress insurrection, and repel invasion," is posited with the Governor (Ohio Const. art. IX, sec. 4).

The statutory law of Ohio states that all commissioned officers of the Ohio National Guard shall be appointed by the Governor, and obligates all commissioned officers to swear their allegiance to the state, and to obey the orders of the Governor (Ohio Rev. Code §§5919.02, 5919.05). The Governor has the sovereign's sanction to order the Ohio National Guard, "to aid civil authorities to suppress or prevent riot or insurrection, or to repel or prevent invasion . . ." (Ohio Rev. Code §§5923.21, 5923.231). No officer may refuse to appear when ordered by the Governor to suppress or prevent riot or insurrection (Ohio Rev. Code §5923.22) in accordance with the above. If an officer of the Ohio National Guard fails to obey the Governor's order, he may be fined $1,000 or imprisoned six months, or both [Ohio Rev. Code §5923.99(A)].

Relative to the status and obligations of Respondent White, President of Kent State University, the statutory enactments of the sovereign designate the Kent State University a state institution (Ohio Rev. Code §3341.01) and vest its government in a board of trustees, appointed by the governor with the advice and consent of the senate [Ohio Rev. Code §3341.02(B)]. Further, this board of trustees is responsible to the sovereign for the election of a president and for the successful operation of the university. The President of Kent State University is, consequently, responsible to the State of Ohio through the board of trustees to do all things necessary for the proper maintenance and successful and continuous operation of such university (Ohio Rev. Code §3341.04).

respondents to act at the Kent State University is not challenged as repugnant to the Federal Constitution.

Assuming, *arguendo*, petitioners could have fairly placed their actions within the general rule, still the federal courts would not, *ipso facto*, obtain jurisdiction. This very point is made in *Larson v. Domestic and Foreign Commerce Corp., supra:*

> "Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. *North Carolina v. Temple*, 134 U.S. 22, 33 L.ed. 849, 10 S.Ct. 509 (1890)". (337 U.S., 691 n. 11)

Thus, in numerous cases asserting unconstitutional acts and naming public officials as party-defendants, this Court has looked behind the pleadings and determined that the suits' nature and effect would detrimentally affect the functions of government. See, *e.g., Louisiana v. Jummel*, 107 U.S. 711 (1883); *Hagood v. Southern*, 117 U.S. 52 (1886); *Ex parte Ayers*, 123 U.S. 443 (1887); *North Carolina v. Temple*, 134 U.S. 22 (1890); *Louisiana ex rel. New York Guaranty and Indem. Co. v. Steele*, 134 U.S. 230 (1890); *Murray v. Williams Distilling Co.*, 213 U.S. 151 (1909); *Carolina Glass Co. v. South Carolina*, 240 U.S. 305 (1916); *Ex parte New York*, 256 U.S. 490 (1921); *Missouri v. Fiske*, 290 U.S. 18 (1933); *Great Northern L. Ins. Co. v. Read*, 322 U.S. 47 (1944); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945); *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371 (1945). As petitioners' contend, many of these cases acknowledge that a public official may be sued for his individual wrongdoings. These decisions, however, all stand for the more basic

proposition that when the suit detrimentally interferes with the functions of government, federal courts are without jurisdiction of the subject matter. The relevant distinction is defined by this Court in *Larson v. Domestic and Foreign Commerce Corporation, supra.*

Obviously, under common agency law, assuming no personal immunities, an agent may always be sued for his individual wrongdoings. The right to sue Ohio's officials, however, is not the issue presently being considered. The issue here is whether these particular actions are, in effect, suits against Ohio. If they are, the actions must fail whether or not the officers might otherwise be suable (paraphrasing this Court's language in *Larson*, 337 U.S., 687).

Plaintiff, in *Larson*, countered by arguing that tortious, illegal acts could not properly be attributable to the government and consequently, the lawsuit would not affect the United States. This Court answered:

> "We believe the theory to be erroneous. *It confuses the doctrine of sovereign immunity with the requirement that a plaintiff state a cause of action.* It is a prerequisite to the maintenance of any action for specific relief that the plaintiff claim an invasion of his legal rights, either past or threatened. He must, therefore, allege conduct which is 'illegal' in the sense that the respondent suggests. If he does not, he has not stated a cause of action. This is true whether the conduct complained of is sovereign or individual. In a suit against an agency of the sovereign, as in any other suit, it is therefore necessary that the plaintiff claim an invasion of his recognized legal rights. If he does not do so, the suit must fail even if he alleges that the agent acted beyond statutory authority or unconstitutionally. *But, in a suit against an agency of the sovereign, it is not sufficient that he make such a claim. Since the sovereign may not be sued, it must also appear that the action to*

be restrained or directed is not action of the sovereign. The mere allegation that the officer, acting officially, wrongfully holds property to which the plaintiff has title does not meet that requirement. True, it establishes a wrong to the plaintiff. *But it does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign. If he is exercising such powers the action is the sovereign's and a suit to enjoin it may not be brought unless the sovereign has consented.*

"It is argued, however, that the commission of a tort cannot be authorized by the sovereign. Therefore, the argument goes, the allegation that a Government officer has acted or is threatening to act tortiously toward the plaintiff is sufficient to support the claim that he has acted beyond his delegated powers. It is on this contention that the respondent's position fundamentally rests, *since it is admitted that, if the action to be prevented or compelled is authorized by the sovereign, the demand for it must fail as a demand against the sovereign.* It has been said, in a very special sense, that, as a matter of agency law, a principal may never lawfully authorize the commission of a tort by his agent. But that statement, in its usual context, is only a way of saying that an agent's liability for torts committed by him cannot be avoided by pleading the direction or authorization of his principal. The agent is himself liable whether or not he has been authorized or even directed to commit the tort. *This, of course, does not mean that the principal is not liable nor that the tortious action may not be regarded as the action of the principal. It does not mean, therefore, that the agent's action, because tortious, is, for that reason alone,* ultra vires *his authority.*" (337 U.S., 692-94; emphasis added)

Rather than attacking respondents' authority for action, petitioners challenge respondents' discretionary acts com-

mitted within the unchallenged scope of their governmental agency. Again, in *Larson*, this Court rejects the argument that incorrect decisions within the scope of governmental duty vests the federal courts with jurisdiction:

> "We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency. A Government officer is not thereby necessarily immunized from liability, if his action is such that a liability would be imposed by the general law of torts. But the action itself cannot be enjoined or directed, since it is also the action of the sovereign." (337 U.S., 695)

See also: *Board of Liquidation v. McComb*, 92 U.S. 531, 541 (1876); *United States on the Relation of Hall v. Payne*, 254 U.S. 343, 347-48 (1920); *Adams v. Nagle*, 303 U.S. 532, 542 (1938).

The reality that respondents' acts were within their valid statutory authority is easily demonstrated. Assume respondents had been ordered to Kent State under the same statutory authority as on May 4, 1970. Assume further that a sniper was unquestionably present atop a university building and had killed many persons. Assume further that one of the respondents had ordered a National Guard marksman to shoot the sniper which mission was thereafter accomplished. Under these facts, *with the Ohio National Guard officer and marksman functioning under the identical statutory warrant*, there is little doubt but that the officer could not be sued by the sniper or his estate pursuant to a Section 1983 cause of action. The point to be made is simple. Petitioners' actions do not challenge

respondents' authority to act but rather their discretionary acts within valid statutory authority.

The *Larson* Court, as an example of an instance when governmental immunity would not be applicable, cites the purchase of a personal home by the government's agent (337 U.S., 689). Since this purchase would not be within the scope of governmental duty, clearly the government's immunity would be irrelevant. Similarly, personal misconduct by respondents during their civilian activities would negate any viability of governmental immunity. Petitioners' actions, however, arose from an incident occurring when the respondents were performing their obligatory governmental duties and consequently the detrimental effect to the State of Ohio resulting from petitioners' lawsuits is pivotal to the federal court's subject matter jurisdiction.

In the case of *Dugan v. Rank*, 372 U.S. 609 (1963), this Court summarized the relevant criteria for determining when a lawsuit, brought nominally against individual public officials, is by its essential nature and effect a suit against the government and barred by the government's immunity.

> "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, *or* interfere with the public administration,' *Land v. Dollar*, 330 U.S. 731, 738, 91 L.Ed. 1209, 1215, 67 S.Ct. 1009 (1947), *or* if the effect of the judgment would be 'to restrain the government from acting, *or* to compel it to act.' *Larson v. Domestic & Foreign Commerce Corp., supra* (337 U.S. at 704); *Re New York*, 256 U.S. 490, 502, 65 L.Ed. 1057, 1062, 41 S.Ct. 588 (1921)." (372 U.S., 620; emphasis added)

It is important to note that these "tests" are stated in the disjunctive, and therefore, if any one of the standards is met in a given case, the suit must be held to be against the government. Interwoven among all of these various formulations is a central, definable theme. Namely, the suit will be considered against the government if, as a product thereof, there will result serious interference with governmental functions. This controlling theme throughout past decisions is identified in *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 51 (1944):

> "[The] ruling that a state could not be controlled by courts in the performance of its political duties through suits against its officials has been consistently followed. *Chandler v. Dix*, 194 U.S. 590, 48 L.Ed. 590, 24 S.Ct. 766; *Fitts v. McGhee*, 172 U.S. 516, 529, 43 L.Ed. 535, 541, 19 S.Ct. 269; *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 167, 53 L.Ed. 742, 750, 29 S.Ct. 458; *Lankford v. Platte Iron Works Co.*, 235 U.S. 461, 468, *et seq.*, 59 L.Ed. 316, 318, 35 S.Ct. 173; *Re New York*, 256 U.S. 490, 500, 65 L.Ed. 1057, 1062, 41 S.Ct. 588; *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 296, 299, 82 L.Ed. 268, 273, 275, 58 S.Ct. 185."

See also: *United States v. Lee*, 106 U.S. 196, 206 (1882); *Land v. Dollar*, 330 U.S. 731, 738 (1947). Indeed, this theme from past analogous cases is crucial to the achievement of the object and purpose underlying the Eleventh Amendment as defined by this Court in *Re Ayers*, 123 U.S. 443, 505-506 (1887):

> "The very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not

been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose."

In accordance with the established law set forth above, the Eleventh Amendment prohibited the trial court from exercising jurisdiction over petitioners' causes of action.

Before the trial court, when ruling upon respondents' Rule 12b(1), motions to dismiss, was the factual matter alleged in petitioners' complaints and contained in the Executive Proclamations attached to the motions (STATEMENT OF CASE, pp 11-13 *supra*). Also, present in the trial court was the law of Ohio defining the legal obligations of respondents to the government.[16] The trial court, weighing these realities (ARGUMENT, I.A. pp 15-17 *supra*) concluded that it was without subject matter jurisdiction. This judgment was entirely consistent with the prior decisions and reasoning of this Court, and demanded by the Eleventh Amendment.

Ohio would be restrained from acting, and the public administration of the law greatly curtailed if the federal courts were to assume jurisdiction over petitioners' causes of action. Although not factually identical, the wisdom of Judge Learned Hand in *Gregoire v. Biddle*, (2d Cir. 1949) 177 F.2d 579, attests to these dire effects:

[16] *ibid.*

"... it is impossible to know whether the claim is well founded until the case has been tried, and ... to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith." (177 F.2d, 581)

In the case of *Barr v. Matteo*, 360 U.S. 564 (1959), this Court recognized the inevitable restraint on the government generated by lawsuits against the government's agents:

"We are called upon in this case to weigh in a particular context two considerations of high importance which now and again come into sharp conflict—on the one hand, the protection of the individual citizen against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government; and on the other, the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities. (360 U.S., 564-65)

* * *

"The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the

fearless, vigorous, and effective administration of policies of government. The matter has been admirably expressed by Judge Learned Hand: (Quoting *Gregoire v. Biddle, supra)* (360 U.S., 571).

* * *

"It seems to us wholly chimerical to suggest that what hangs in the balance here is the maintenance of high standards of conduct among those in the public service. To be sure, as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good. And there are of course other sanctions than civil tort suits available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner. We think that we should not be deterred from establishing the rule which we announce today by any such remote forebodings. (360 U.S., 576)"

Under the reasoning of *Gregoire* and *Barr*, the State of Ohio would be restrained from acting in time of rampage and insurrection, and the public administration of this government's laws would be greatly impeded if the federal courts were to assume subject matter jurisdiction over petitioners' causes of action. On balance, before the trial court, was the State of Ohio's ability to protect life and property within her bounds.[17]

[17]The realities confronting Ohio's public officials, and consequently the State of Ohio, if federal courts were to exercise subject matter jurisdiction over actions such as these is, perhaps, best demonstrated by the instant cases. Captain Srp is isolated as a fair example although any one of the respondents is similarly situated.

Captain Srp, a man of no extraordinary wealth or position, is presently named as a party defendant in eleven federal lawsuits

(footnote continued)

This Court, on numerous occasions, has identified the most important function of government to be providing security for the citizenry and the protection of their property. For instance, in *Sterling v. Constantine*, 287 U.S. 378 (1932), the Court stated:

> "As the State has no more important interest than the maintenance of law and order, the power it confers upon its Governor as Chief Executive and Commander in Chief of its military forces to suppress insurrection and to preserve the peace is of the highest consequence." (287 U.S., 399)

See, also, Miranda v. Arizona, 384 U.S. 436, 539 (1966) (dissenting opinion, White, J.); *Lanzetta v. New Jersey*, 306 U.S. 451, 455 (1939); *Luther v. Borden*, 48 U.S. (7 How.) 1, 45 (1849). Certainly, if a State's treasury *(Ford Motor Co. v. Treasury Department, supra)* and freedom of contract *(Ex parte New York, supra)* are protected, the highest function of the State must be even more zealously insured.

If in times of insurrection and emergency demanding discretionary acts, Ohio's public officials, functioning under their unchallenged obligation to the state, could, at the stroke of a vindictive plaintiff's pen, be subjected to the threats of hindsight and *ex post facto* speculation, Ohio would be hard pressed to find responsible officials to act. This reality, manifest in the trial court and court of appeals, prohibited the federal courts from acquiring subject matter

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arising out of the Kent State incident. The total amount of potential judgments against Captain Srp is $41,000,000, together with punitive damages which the federal court is asked to value. Additionally, Captain Srp and his family have been subjected to public harassment and serious interference with their daily lives. No great imagination is necessary to conclude that Captain Srp, and those public officials who hear of a precedent permitting these actions to go before a jury, will be hesitant to act on behalf of the State of Ohio, or perhaps, ignore completely the call to duty.

jurisdiction over petitioners' actions. If this Court were to determine the doctrine of executive immunity not available to shield Ohio's executive officials from the inevitable lawsuits, the adverse effects upon the State become even more demonstrable.

Rather than departing from the established law, the lower courts' judgment was mandatory: under the facts at bar; in accordance with the Eleventh Amendment; the object and purpose behind this Amendment; and the tests announced by this Court in *Dugan v. Rank, supra*. The trial court, balancing the facts at bar, was bound by the Supreme Law of the Land.

Petitioners call this Court's attention to *Ex parte Young*, 209 U.S. 123 (1908). *Ex parte Young*, and its progeny, established a very narrow rule. That case stands for the limited proposition that:

> "... individuals who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and *who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of equity from such action.*" (*Ex parte Young, supra*, 209 U.S., 155-56; emphasis added). See: *Employees v. Missouri Public Health Dept.*, U.S. , 36 L.Ed.2d 251, 272 (1973).

Previously, respondents identified the general rule that public officials may be sued if (1) their acts are outside statutory warrant or if the statutory warrant under which they act, or are about to act, is alleged repugnant to the Federal Constitution; and (2) the lawsuits will not seri-

ously interfere with governmental functions, determined by their nature and effect. If a case comes within the narrow rule of *Ex parte Young*, interference with governmental functions is not considered although obviously the government's activities are blocked. [209 U.S., 174 (J. Harlan, dissenting)]. The fiction of *Ex parte Young* is set forth in the decision:

> "... The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional." (209 U.S., 159)

The essence of the *Ex parte Young* fiction is that the public official had *no authority* from the State to enforce an unconstitutional statute. The cases at bar are not within the fiction since respondents acted at Kent State pursuant to statutory authority not challenged as being repugnant to the Federal Constitution. Respondents' authority to act in the name of Ohio is not in issue. The *Ex parte Young* rule is not relevant to the Eleventh Amendment issue now before this Court. The lower courts properly considered the interference with governmental functions resulting from petitioners' lawsuits nominally against Ohio's public officials.

The same irrelevancy to the circumstances at bar characterize the cases cited by petitioners as endorsing *Ex parte Young*. *Pennoyer v. McConnaughy*, 140 U.S. 1 (1891) (suit to enjoin the enforcement of an unconstitutional State statute); *Prout v. Starr*, 188 U.S. 537 (1903) (suit

to enjoin the enforcement of an unconstitutional State statute); *General Oil Co. v. Crane, Inspector of Coal Oil*, 209 U.S. 211 (1908) (suit to enjoin the enforcement of an unconstitutional State statute); *Sterling v. Constantine*, 287 U.S. 378 (1932) (suit to enjoin State official's acts allegedly outside statutory warrant, or in alternative, unconstitutional State statutes); *Baker v. Carr*, 369 U.S. 186 (1962) (suit for declaration that state apportionment act was unconstitutional and to enjoin further elections under the act); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (suit for declaration alleging that the state apportionment act was unconstitutional and to enjoin further elections thereunder); *Griffin v. School Bd. of Prince Edward*, 377 U.S. 218 (1964) (suit to enjoin payment of public funds to segregated schools).

In footnote to *Gilligan v. Morgan*, U.S. , 37 L.Ed.2d 407 (1973), this Court's majority opinion affirms that federal courts are empowered to adjudicate claims for injury caused by military intrusions into society's civilian sector. (37 L.Ed., 416 n. 16). Three cases are cited in support of this general statement. None of the cases is contrary to respondents' position and all endorse respondents' approach to Eleventh Amendment question.

Duncan v. Kahanamoku, 327 U.S. 304 (1946), considered the authority of military tribunals under Section 67 of the Hawaiian Organic Act. Petitioners, via writs of habeas corpus, alleged that the public officials, acting under the guise of Section 67, had acted *ultra vires*, exceeding the scope of their statutory warrant, or in the alternative, petitioners alleged that Section 67 was unconstitutional. Clearly, *Duncan* comes within the fiction of *Ex parte Young, supra*, making an inquiry as to the effect upon the government irrelevant.

Likewise, *Sterling v. Constantine*, 287 U.S. 378 (1932), is within the *Ex parte Young* tradition. In *Sterling*, this Court was presented an injunctive action asking that public officials be enjoined from enforcing limits upon the production of oil. It was again alleged that the ordering of quotas was beyond the public officials' statutory authority, or in the alternative, that the statutory warrant was repugnant to the Federal Constitution.

Finally, *Laird v. Tatum*, 408 U.S. 1 (1972), presented an injunctive action alleging that the surveillance programs of the Army were *ultra vires* its Congressionally assigned mission, 10 U.S.C. §331. The majority decision in *Laird* considered the facts as presenting neither case nor controversy. Consequently, it was not necessary for the Court, presented acts allegedly outside statutory authority, to determine if the nature and effect of the suit against public officials interferred with basic governmental functions.

Duncan, *Sterling* and *Laird* do not defeat respondents' Eleventh Amendment argument. *Duncan* and *Sterling* are within the narrow rule of *Ex parte Young*. Although *Laird* is not within the *Ex parte Young* rule, this Court's holding of non-justiciability made the nature and effect test irrelevant to the case's final disposition.

Petitioners contend that the implementing language of the Fourteenth Amendment modifies the Eleventh Amendment, enabling Congress to provide federal jurisdiction over the States. (Sch. Br. 23-24, K.-M. Br. 29-30). Not only is this bold assertion unprecedented but it runs amiss well-known rules of construction and historical logic.

In 1868, when the Fourteenth Amendment was adopted, the Eleventh Amendment had governed seventy years. The realities of the Amendment, as defined by this Court, were certainly known to the drafters of the Fourteenth Amend-

ment, as were the circumstances of its birth. This Court in *Hans v. Louisiana*, 134 U.S. 1, 10-11 (1890), recounted the occasion:

> "... *Chisholm v. Georgia*, [holding that a State was liable to suit by a citizen in federal court under the Constitution as originally drawn, 2 U.S. (2 Dall.) 419 [1793)] ... created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the Legislatures of the States."

If it had been the plan of the Fourteenth Amendment to diminish the scope of the Eleventh Amendment, certainly the intent would have been clearly expressed, and not relegated to implication and conjecture.

Further, Section 5 of the Fourteenth Amendment states: "The Congress shall have the power to enforce, *by appropriate legislation*, the provisions of this article." (Emphasis added) The phrase, "by appropriate legislation," was a limitation upon the authority of Congress, limiting Congress to that legislation consistent with the then existing constitutional provisions and amendments. To hold otherwise, would result in the phrase being superfluous. Legislation opposed to the earlier, *explicit* constitutional mandates of the Eleventh Amendment and Article III [*Cf. Employees v. Missouri Public Health Dept.*, U.S. , 36 L.Ed.2d 251, 260-62 (1973) (concurring opinion)] would, indeed, be inappropriate.

This interpretation of Section 5, Fourteenth Amendment, is confirmed by *Katzenbach v. Morgan*, 384 U.S. 641 (1966). In *Katzenbach*, this Court referred to *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), in which

Chief Justice Marshall defined the perimeters of the Necessary and Proper Clause, Art I, §8,cl 18, thusly:

> "Let the end be legitimate, *let it be within the scope of the constitution*, and all means which are appropriate, which are plainly adopted to that end, *which are not prohibited, but consistent with the letter and spirit of the constitution*, are constitutional." (17 U.S., 421; emphasis added.)

After quoting Chief Justice Marshall, *Katzenbach* places the *M'Culloch* boundaries on Section 5, Fourteenth Amendment:

> "Thus, the M'Culloch v. Maryland standard is the measure of what constitutes 'appropriate legislation' under §5 of the Fourteenth Amendment." *(Katzenbach v. Morgan, supra,* 384 U.S., 651)

Finally, petitioners' proposition runs against this Court's past decisions rendered in close proximity to the adoption of the Fourteenth Amendment. For instance, the fiction of *Ex parte Young, supra,* and its progeny, become irrelevant if Congress possessed the authority to subject States to federal jurisdiction. Section 5 of the Fourteenth Amendment has not given Congress the extraordinary authority to diminish the Eleventh Amendment absent consent of the State.

The Scheuer brief, however, calls three cases to the attention of this Court. Initially, in *Parden v. Terminal R. Co., supra,* this Court affirmed the viability of the Eleventh Amendment. Thereafter, it was held that when the States *consented* to Congressional regulation of interstate commerce, the States also consented to Congress authorizing the federal courts' jurisdiction over FELA cases. *Employees v. Missouri Public Health Dept., supra,* delineated the bounds of *Parden*. Again in *Employees*, this Court affirmed its past Eleventh Amendment decisions and

thereafter limited *Parden's* potential reach. Specifically, *Employees* refused to find Congressional intent to subject the States to federal jurisdiction over matters involving interstate commerce absent clear statutory intent. Thus, *even assuming for argument* that Section 5 of the Fourteenth Amendment gave Congress the authority to subject the States to federal jurisdiction, the language of Section 1983 fails to show the mandatory Congressional intent to achieve this end. The judiciary is not at liberty to "recast this statute to expand its application beyond the limited reach Congress gave it." *District of Columbia v. Carter*, 409 U.S. 418, 433 (1973).

Katzenbach v. Morgan, supra, is cited for a last-ditch assertion:

> "... [E]ven if the Fourteenth Amendment would not itself abrogate an interpretation of the Eleventh Amendment which closed the federal courts to suits against State officers, the Congress had the power to do so, ... and, in fact, intended to do so." (Sch. Br. 24)

In the first instance, *Katzenbach* considered a conflict between a State's statutory voting right requirements and the preemptive character of federal legislation in the same area. *Katzenbach* did not present a conflict between the Eleventh Amendment and Section 5 of the Fourteenth Amendment.

Secondly, petitioners' statement completely misses the thrust of respondents' Eleventh Amendment argument. Under this argument, respondents do not contend that Congress was without authority to create a federal cause of action against State public officials. Rather, it is respondents' position that Congress neither had the power nor the intention to subject the States to federal jurisdiction

when enacting Section 1983. Hence, since these suits are in reality against Ohio, brought only nominally against Ohio's public officials, their circumstances are foreign both to Congressional authority and desire.

Petitioners argue that federal jurisdiction over petitioners' actions is required by this Court's decision, *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971); specifically, every right constitutionally demands a remedy. (Sch. Br. 24-26, K.-M. 53-57). The case does not stand for this broad assertion. *Bivens* held that a citizen's Fourth Amendment right to be free from unreasonable searches and seizures by federal agents included a federal cause of action for damages occasioned by the federal agents' unconstitutional conduct. Respondents do not argue that petitioners have no federal cause of action. Respondents' argument is, rather, that the federal courts have no subject matter jurisdiction in that petitioners' Section 1983 causes of action are in essence against Ohio. Clearly, this Court, in *Bivens*, was not presented an issue pertaining to subject matter jurisdiction over the Federal Government, much less an issue of subject matter jurisdiction over a State *vis-à-vis* the Eleventh Amendment. Likewise, *District of Columbia v. Carter, supra*, does not concern this relevant issue.

Underlying this Court's decision in *Bivens*, and consequently petitioners' argument based upon it, is the statement by Chief Justice Marshall found in *Marbury v. Madison*, 5 U.S. (1 Cranch) 60, 69 (1803):

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."

Obviously, by these words, Chief Justice Marshall did not intend that civil liberty included the right to sue a State for in *Osbourn v. United States Bank*, 22 U.S. (9 Wheat.) 204 (1824), Marshall applied the Eleventh Amendment.[18]

In *Palmer v. The State of Ohio*, 248 U.S. 32 (1918), this Court responded to petitioners' assertion that the Fourteenth Amendment guarantees an effective remedy; (K.-M. Br. 53-57) *i.e.*, both a cause of action *and a court with competent, subject matter jurisdiction:*

> "The right of individuals to sue a state, in either a Federal or a state court, cannot be derived from the Constitution, or laws of the United States. It can come only from the consent of the state. *Beers v. Arkansas*, 20 How. 527; *Railroad Co. v. Tennessee*, 101 U.S. 337; *Hans v. Louisiana*, 134 U.S. 1." (248 U.S., 33)

See also: *Krause, Admr. v. Ohio*, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972), *appeal denied*, 34 L.Ed.2d 506 (1972), *pet. for reh. denied*, 35 L.Ed.2d 280 (1973).

Further, all petitioners intimate that the State of Ohio has effectively foreclosed any state court remedy for their damages. (Sch. Br. 25, K.-M. 40-41) This is simply not true. Section 5923.37, Ohio Revised Code, provides:

> "When a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct."

Today, lawsuits, arising from the Kent State incident, are pending in the Common Pleas Court of Cuyahoga County,

[18] *Supra* note 14.

Ohio, alleging both willful and wanton misconduct.[19] Respondents, along with other agents of the State of Ohio are named party-defendants. Consequently, any argument predicated upon a lack of effective remedy is not ripe for adjudication. *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947).

B. *Petitioners' Wrongful Death Causes of Action; Title 28 U.S.C. §1332.*

Initially, respondents incorporate, herein, the first section of this argument (ARGUMENT, III, A., pp. 38-61

[19]Common Pleas Court of Cuyahoga County, Ohio, Civil Case Nos. 894,442 and 905,792, captioned: No. 894,442, *Dean Kahler, Elaine Kahler, Joseph Lewis, Elizabeth Lewis, Arthur Krause, etcetera v. Governor James Rhodes, Sylvester Del Corso, Robert Canterbury, Lt. Col. Charles Fassinger, Capt. Raymond J. Srp, Lt. Roy W. Dew, Lt. Alexander Stevenson, Sgt. Mike Pryor, Sgt. Rudy Morris, SP/4 Ronald West, Major Harry D. Jones, Capt. John E. Martin, Capt. James R. Snyder, Lt. Fallon, Lt. Klein, Sgt. Robert James, Sgt. Leon Smith, Sgt. Richard Love, Sgt. Dale Amtram, Sgt. James Farriss, Sgt. Dennis Breckenridge, Sgt. Michael DeLaney, Sgt. Lawrence Shafer, Sgt. Barry Morris, Sgt. Snure, Sgt. McManus, SP/4 Gerald Lee Scalf, SP/4 Russell Repp, SP/4 James Pierce, SP/4 Ralph Zollar, SP/4 James McGee, SP/5 Gordon R. Bedall, William Herschler, David Rogers, Paul Navjoks, Lonnie D. Hinton, Phillip D. Raber, Paul Zimmerman, Richard Shade, and two-hundred "John Doe" defendants.*

No. 905,792, *Louis Schroeder, Elaine Miller, etcetera, Douglas Wrentmore, Alan Canfora, John R. Cleary, Thomas Grace, Donald MacKenzie, and James Russell v. Governor James Rhodes, Sylvester Del Corso, Robert Canterbury, Lt. Col. Charles Fassinger, Capt. Raymond J. Srp, Lt. Roy W. Dew, Sgt. Mike Pryor, Sgt. Rudy Morris, SP/4 Ronald West, Major Harry D. Jones, Capt. John E. Martin, Capt. James R. Snyder, Lt. Fallon, Lt. Klein, Sgt. Robert James, Sgt. Leon Smith, Sgt. Richard Love, Sgt. Dale Amtram, Sgt. James Farriss, Sgt. Dennis Breckenridge, Sgt. Michael DeLaney, Sgt. Lawrence Shafer, Sgt. Barry Morris, Sgt. Snure, Sgt. McManus, SP/4 Gerald Lee Scalf, SP/4 Russell Repp, SP/4 James Pierce, SP/4 Ralph Zollar, SP/4 James McGee, SP/5 Gordon R. Bedall, William Herschler, David Rogers, Paul Navjoks, Lonnie D. Hinton, Phillip D. Raber, Paul Zimmerman, Richard Shade, and two-hundred "John Doe" defendants.*

infra) since Ohio's Eleventh Amendment immunity to suit is dispositive of not only petitioners' Section 1983 causes of action but also petitioners' wrongful death actions brought pursuant to the federal courts' diversity jurisdiction. In addition, the immunity of Ohio, under the Ohio substantive law, is controlling in Ohio's federal fora. Title 28 U.S.C. §1652; *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Article I, Section 16 of the 1851 Constitution of Ohio, as amended in 1912, states in relevant part:

> "Suits may be brought against the state, in such courts and in such manner, as may be provided by law."

Recently, in another lawsuit arising out of the Kent State tragedy, this Court and the Supreme Court of Ohio, had occasion to consider this provision of the Ohio Constitution. In the case of *Krause, Admr. v. Ohio*, 31 Ohio St. 2d 132, 285 N.E. 2d 736, *appeal denied*, 34 L.Ed.2d 506 (1972); *pet. for reh. denied*, 35 L.Ed.2d 280 (1973), the Ohio Supreme Court ruled in its syllabus:

> "1. The state of Ohio is not subject to suits in tort in the courts of this state without the consent of the General Assembly. (*Raudabaugh v. State*, 96 Ohio St. 513, 118 N.E. 102; *Palumbo v. Indus. Comm.*, 140 Ohio St. 54, 42 N.E.2d 766; *State, ex rel. Williams v. Glander*, 148 Ohio St. 188, 74 N.E.2d 82; and *Wolf v. Ohio State Univ. Hospital*, 170 Ohio St. 49, 162 N.E.2d 475, approved and followed.)
>
> * * *
>
> "3. Section 16 of Article I of the Ohio Constitution, as amended September 3, 1912, which provides that ' * * * Suits may be brought against the state in such courts and in such manner, as may be provided by law,' is not self-executing, and statutory consent is a prerequisite to such

suit. (*Raudabaugh, Palumbo, Williams* and *Wolf, supra*, approved and followed.)

* * *

"4. Section 16 of Article I of the Ohio Constitution does not offend the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution."

Therefore, even ignoring the Eleventh Amendment, it is established, and recently confirmed, that Ohio is immune to suit in its state courts. Consequently, under the same Ohio law, the State cannot be sued in the United States District Courts sitting in Ohio.

The Ohio case of *State, ex rel. Williams, v. Glander*, 148 Ohio St. 188, 74 N.E.2d 82 (1947) is analogous to the federal law affirmed in *Dugan v. Rank, supra*. In *Glander*, the Ohio Supreme Court, quoting and adopting 42 *American Jurisprudence*, 304, Section 92, stated the Ohio test for determining when an action is against the State, brought through nominal party defendants:

> " 'While a suit against state officials is not necessarily a suit against the state, within the rule of immunity of the state from suit without its consent, that rule cannot be evaded by bringing an action nominally against a state officer or a state board, commission, or department in his or its official capacity when the real claim is against the state itself, and the state is the party vitally interested. If the rights of the state would be directly and adversely affected by the judgment or decree sought, the state is a necessary party defendant, and if it cannot be made a party, that is, if it has not consented to be sued, the suit is not maintainable. The state's immunity from suit without its consent is absolute and unqualified, and a constitutional provision securing it is not to be so construed as to place the state within the reach of the process of the court.' " (*State, ex rel. Williams, v. Glander, supra*, 148 Ohio St., 193).

Under analogous reasoning as that contained in *Gregoire v. Biddle, supra,* and *Barr v. Matteo, supra,* it is apparent that, pursuant to the tests defined in the *Glander* case, Ohio is "vitally interested" in petitioners' diversity actions, and that "the rights [and obligations] of the state would be directly and adversely affected by the judgment." Hence, in accordance with the established law of Ohio, the State is immune to petitioners' diversity causes of action.

C. *Section 5923.37, Ohio Revised Code.*

Referring to Section 5923.37, Ohio Revised Code, petitioners declare that "this statute supercedes and waives any immunity otherwise available to the State of Ohio (K.-M. Br. 81)." Section 5923.37 provides:

> "*When a member of the organized militia* is ordered to duty by state authority during a time of public danger, *he is not answerable* in a civil lawsuit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct." (Emphasis added)

The rule of construction, under both the federal and state law, is established that alleged statutory consents of the sovereign to suit are to be strictly construed. See, *e.g., Ford Motor Co. v. Treasury Department, supra,* 323 U.S., 465; *Great Northern Life Insurance Co. v. Read,* 322 U.S. 47, 54 (1944); *Lee Turzillo Contr. Co. v. Cincinnati Met. Hous. Auth.,* 10 Ohio St.2d 5, 225 N.E.2d 255 (1967). Obviously, the subject of Section 5923.37, Ohio Revised Code, is "a member of the organized militia"; not the State of Ohio. *Even the most strained construction of this section,* that still borders legitimacy, could not result in the section constituting Ohio's waiver of its Eleventh Amendment

immunity to suit, nor the immunity constitutionalized by Article I, Section 16, Ohio Constitution.

Petitioners conclude:

> ". . . Moreover, to the extent that Ohio seeks to claim sovereign immunity . . . , the application of the doctrine of sovereign immunity is unconstitutional in that it violates the rights of these petitioners to due process of law and equal protection of the laws guaranteed in the Fourteenth Amendment. Cf, the dissenting opinion of Justice Lloyd Brown of the Ohio Supreme Court in *Krause, Admr. v. State of Ohio, supra* (31 Ohio St.2d 132, 285 N.E.2d 736 (1972)." (K.-M. Br. 82)

This argument has previously been foreclosed by this Court's dismissal of the appeal in *Krause, Admr. v. Ohio, supra,* for want of a substantial federal question (34 L.Ed. 2d 506).

Today, from all corners, come serious challenges to the propriety of governmental immunity. Unquestionably, many of the historic justifications are vulnerable to attack. A predication of the immunity of government to suit upon the oft-quoted statement, "The King can do no wrong," is indeed absurd in modern-day America. So too, Justice Holmes' reliance upon Bodin's syllogism to justify the immunity strikes a dissonant note of unfairness in the late Twentieth Century; the logical proposition that there can be no legal right against the authority that makes the law upon which the right depends is a questionable basis. [*Kawananakoa v Polyblank,* 205 U.S. 349, 353 (1907).]

Respondents' position is neither lodged in the abstract nor upon antiquated notions. To the contrary, respondents' endorsement of Ohio's governmental immunity to petitioners' suits is premised upon the utilitarian justification that there must be no serious interference with the most

important function of government—effective law enforcement. Of course, in our country, every individual is sovereign. *Employees v. Missouri Public Health Dept., supra,* 36 L.Ed.2d, 278 (dissenting opinion). In the same vein, Government is nothing more than the collective group of individual sovereigns; Government is not an impersonal, beastly entity. On the scales before the Court are the rights of three sovereign citizens to be balanced against the right of all sovereign citizens to effective law enforcement. A pragmatic reading of the balance favoring the collective sovereigns' interests is not foreign to the democrats' social contract.

IV. *The Allegations of Petitioners' Complaints Concerning the Propriety of Training and Weaponry of the Ohio National Guard Raise Non-Judiciable Political Questions.*

Petitioners' complaints allege that respondents ordered improperly trained and inappropriately armed troops to Kent State University resulting in the deaths of their decedents.[20] The issues raised by these allegations are non-justiciable as previously determined by this Court in the analogous case of *Gilligan v. Morgan,* U.S. , 37 L.Ed.2d 407 (1973).[21]

Although in *Flast v. Cohen,* 392 U.S. 83, 95 (1968), this Court acknowledged the concept of "justiciability" to be of uncertain meaning and scope, the bounds of the political question doctrine have been previously delineated. Justice Brennan in *Baker v. Carr,* 369 U.S. 186 (1962), identified

[20] *E.g.,* Krause Complaint, First Cause of Action, paragraphs 9-10 and Second Cause of Action, paragraphs 3-4 (K.-M. App. 3-8).

[21] Respondents, under this portion of their argument do not advocate, nor has the lower appellate court held (Sch. Pet. 17a-19a), that petitioners' complaints be dismissed *in toto* for non-justiciability. Rather, respondents contend that petitioners' allegations challenging the appropriateness of the Ohio National Guard's training and weaponry raise political questions, and therefore are properly dismissed.

six elements which historically have lead to a determination of non-justiciability pursuant to the political question doctrine:

> "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." (369 U.S., 217)

As indicated in *Baker* (369 U.S., 217), the presence of any one of these elements, justifies the case's dismissal as a function of separation of power. In the instant cases, all of the defined elements are inextricably involved in petitioners' allegations challenging the propriety of the Ohio National Guard's training and weaponry.[22]

First, there exists a textually demonstrable constitutional commitment of the issue to a coordinate political

[22]Of course, the cases at bar neither involve voting rights as in *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 533 (1964), nor the rights of prisoners as *Harris v. Kerner*, 404 U.S. 519 (1972). Consequently, the traditional indicia for determining non-justiciability pursuant to the political question doctrine are viable and controlling. *Cf. Gilligan v. Morgan*, U.S. , 37 L.Ed.2d 407, 416 (1973).

department. Art I, §8, cl 16, United States Constitution, vests in Congress the power:

> "To provide for organizing, arming and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to each State respectfully, the appointment of Officers, and the authority of training the Militia according to discipline *provided by Congress.*" (Emphasis added)

In *Gilligan v. Morgan, supra,* this Court determined that Art I, §8, cl 16 ". . . is explicit that the Congress shall have the responsibility for organizing, arming and disciplining the Militia . . ." (37 L.Ed.2d, 413). After demonstrating the legislature's enactments pursuant to the authority of Art I, §8, cl 16, Chief Justice Burger concluded:

> ". . . The Guard is an essential reserve component of the Armed Forces of the United States, available with regular forces in time of war. The Guard also may be federalized in addition to its role under state governments, to assist in controlling civil disorders. The relief sought by respondents [injunctive and supervisory relief], requiring initial judicial review and continuing surveillance by a federal court over the training, weaponry and orders of the Guard, would therefore embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of Government." (37 L.Ed.2d, 413-14)[23]

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[23]For a comprehensive discussion of the origins of the National Guard, see Wiener, *The Militia Clause of the Constitution,* 54 Harv. L. Rev. 181 (1940). In the late Eighteenth century the militia was "a home-defense force, composed of most able-bodied men." Wiener, *supra,* 54 Harv. L. Rev. at 182. Most of the nation's military problems during the late Eighteenth and early Nineteenth centuries were dealt with by the militia and not by a standing army. During this time, however, the deficiencies of the militia became notorious

(footnote continued)

Secondly, the Judicial Branch lacks both the physical capabilities and academic skills to define standards upon which to guage the propriety of training and weaponry provided the Ohio National Guard. Adequate machinery to test, observe, and thereafter evaluate alternative weapons and training techniques are not available to the judiciary. Further, the judiciary has neither the prerogative nor time to conduct non-adversary, investigatory hearings demanded to rationally resolve the administrative issues raised by petitioners.

Not only is the Judicial Branch physically ill-suited to isolate appropriate standards upon which to adjudge the Ohio National Guard's training and weaponry but the judiciary is limited to a narrow field of legal expertise. Inquiries into and solutions to the military questions raised by petitioners' allegations are foreign to the judicial arena of competence. A federal trial court would indeed be hard pressed to fairly instruct a jury on the military questions raised herein. Equally, if not more precarious, would be the plight of twelve laymen when called upon to make technical, factual determinations concerning the appropriateness of the training and weaponry provided the States' Army National Guard components by the Department of Army. Clearly, the policy determinations demanded by petitioners' military issues are of a character for non-judicial discretion.

—for example, many militiamen refused to fight outside their own state—and an expansion of the regular army gradually took place. The first modern institutional reforms were introduced by the Army Reorganization Act of 1901, 31 Stat. 748, which established a regular army "suited to the requirements of the United States as a world power" (54 Harv. L. Rev. at 193), and the Dick Act of 1903, 32 Stat. 775, which "provided for an Organized Militia, to be known as the National Guard, which should conform to the Regular Army organization, be equipped through federal funds, and be trained by Regular Army instructors" (54 Harv. L. Rev. at 195).

Referring to several examples of civil disturbance publications that could be considered by a trial court as authoritative when attempting to resolve military questions, this Court stated:

> "This [a trial court surveying the motley group of publications and authorities] would plainly and explicitly require a judicial evaluation of a wide range of possibly dissimilar procedures and policies approved by different law enforcement agencies or other authorities; and the examples cited may represent only a fragment of the accumulated data and experience in the various States, in the armed services, and in other concerned agencies of the Federal Government. Trained professionals, subject to the day to day control of the responsible civilian authorities, necessarily must make comparative judgments on the merits as to evolving methods of training, equipping, and controlling military forces with respect to their duties under the Constitution. It would be inappropriate for a district judge to undertake this responsibility, even in the unlikely event that he possessed requisite technical competence to do so." *(Gilligan v. Morgan, supra,* 37 L.Ed.2d, 414).

Thirdly, an isolated judicial precedent within the nonjudicial bailiwick would generate myriad questions and stymie effective law enforcement. For instance, could the Department of Army modify, and perhaps improve, the judicially endorsed standards resulting from the trial of these military issues? Would a judicial precedent under the isolated circumstances before the Court control future campus disturbances presenting factual realities not identical to those of May 4, 1970? If the judicial determinations herein and Department of Army regulations conflicted, which directives would control? Would the judiciary be required to supervise the weekend drills and summer

encampments of the Army National Guard to assure judicial standards were carried out? Who would determine, in the heat of insurrection, if the then-present riotous situation fell within the facts and precedent established by these cases?

These questions are raised to demonstrate the quagmire upon which future military commanders, the Department of Army, *and the judiciary* would be placed if this Court were to hold petitioners' allegations justiciable. In dealing with civil disorder the government must be able to act immediately and confidently lest the delay and doubt insure the success of the insurgency. This vital assurance and split second flexibility demanded by military confrontations are not characteristics of our relatively rigid legal system bound by the ties of narrowly drawn precedent.

A judicial determination herein would indicate disrespect for the Legislative and Executive Branches of government. As herebefore demonstrated, Congress is vested by the Constitution with authority and the responsibility for training and providing weapons to members of the national guard. The President also has been delegated the responsibility of prescribing regulations controlling these matters. A judicial review into the propriety of the coordinate branches' decisions would express disrespect and a lack of confidence in the Legislative and Executive Branches of government to wisely and faithfully fulfill their assigned duties.

Finally, decision by the judiciary would also create the potentiality of multifarious, and even conflicting pronouncements by the various branches on this subject. Congress, pursuant to its constitutional authority, has enacted statutes governing the training and weaponry of the National Guard. See, *e.g.*, 32 U.S.C. §501, *et seq.*, and 32 U.S.C. §701, *et seq.* Congress may enact new statutes

or amend existing statutes in the future. The President has prescribed regulations concerning the training of the national guard; he also may prescribe new regulations on the subject in the future. If courts attempt to evaluate the training and weaponry of the national guard, there is an eminent possibility that such a mandate would conflict with either existing or future directives from Congress and/or the President.

In the case of *Orloff v. Willoughby*, 345 U.S. 83 (1953), this Court was confronted with similar administrative decisions coming at loggerheads with the asserted rights of a citizen. Therein, this Court concluded:

> "... But judges are not given the task of running the Army ... The military constitutes a specialized community governed by a separate discipline from that of civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters ... It is not difficult to see that the exercise of such jurisdiction as is here urged would be a disruptive force as to affairs peculiarly within the jurisdiction of military authorities." (345 U.S., 93-95)

And in *Gilligan v. Morgan, supra*, this Court concludes:

> "It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches, directly responsible—as the Judicial Branch is not—to the elective process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative

> and Executive Branches. The ultimate responsibility for these decisions are appropriately vested in branches of the government which are periodically subject to electoral accountability. It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system . . ." (37 L.Ed.2d, 415-16).

In May of 1970, both the Legislative and Executive Branches had formulated considered directives concerning the training and weaponry provided the Ohio National Guard. New and advanced policies and equipment will evolve with the inevitable innovation of military technology. These past and future decisions, promulgated by the coordinate political branches of government, must not be exposed to "disruptive" judicial process.

The Scheuer brief is alone in its discussion of *Gilligan v. Morgan, supra* (Sch. Br. 35-38). The basic thrust of its argument is that *Morgan* does not foreclose petitioners' damage actions *in toto*. Respondents do not disagree with this, but contend the petitioners' specific allegations attacking the propriety of the Ohio National Guard's training and weaponry are precluded by the *Morgan* precedent.

Morgan asked injunctive and supervisory relief relative to the training and weaponry of the Ohio National Guard. The allegations at hand likewise question the propriety of the Ohio National Guard's training and weaponry requesting compensatory and punitive damages. Therefore, the only difference between *Morgan* and petitioners' military allegations is in the relief sought.

It would be wrong to hold the military allegations at bar justiciable in light of the non-justiciable decision in *Morgan*. Certainly the difference in relief sought is not a sound basis for doing so. Indeed, if the propriety of military train-

ing and weaponry was ever to be found justiciable, it would be before the harm had occurred. *Morgan*, however, foreclosed such injunctive relief. An anomaly would result if this Court were to hold that federal courts cannot prevent injury; however, once the injury has occurred, it may be compensated in the federal courts. This Court's ruling in *Morgan* controls the justiciability of petitioners' allegations challenging the propriety of the training and weaponry provided the Ohio National Guard.

V. *The Federal Government Is An Indispensable Party to the Adjudication of Petitioners' Allegations Concerning the Training and Weaponry of the Ohio National Guard.*

Again, as in the fourth argument, respondents do not argue for the dismissal of petitioners' complaints in their entirety. Rather, it is respondents' position that petitioners' allegations attacking the propriety of the Ohio National Guard's training and weaponry were properly dismissed.[24] The Federal Government is an indispensable party to the adjudication of these military allegations as held by the lower appellate court (Sch. Pet. 17a-19a). Rule 19(a)(2)(i)(ii), Fed. R. Civ. P., defines the relevant criteria upon which the Federal Government is determined a necessary party.

First, a disposition of these issues would, as a practical matter, impair and impede the ability of the Federal Government to protect the national interests involved therein. Respondents have previously demonstrated the inextricable involvement of the Federal Government in the training and weaponry of the Ohio National Guard.[25] Under the "effect" tests defined by this Court in *Dugan v. Rank*, 372

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[24] *Supra* note 20.

[25] See, *e.g.*, Wiener, *The Militia Clause of the Constitution*, *supra* note 23.

U.S. 609, 620 (1963), there is little doubt but that the Federal Government's functions would be impaired and impeded by the adjudication of these military issues. A judicial determination as to the propriety of the National Guard's training and weaponry would not only interfere with the public administration of the law providing for this training and weaponry [*Land v. Dollar*, 330 U.S. 731, 738 (1947)], but would also restrain the Federal Government from acting and/or compel the Federal Government to act in this critical area vitally affecting national security. [*Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949).]

Secondly and independent of the above, the officers of the National Guard would face substantial risk of incurring inconsistent obligations. If a judicial decision differed from the directive promulgated by the Department of Army, the officers of the National Guard, pledged to each, would be placed in jeopardy when deciding to which master to pay their allegiance. Pursuant to Rule 19(a) (2) (i) (ii), the Federal Government is a necessary party to petitioners' claims that the Ohio National Guard was improperly trained and armed May 4, 1970.

It stands without citation that the Federal Government cannot be made a party to the adjudication of petitioners' claims concerning the training and weaponry provided Ohio's National Guard. Rule 19(b), Fed. R. Civ. P., contains practical and pragmatic considerations for determining when claims involving necessary parties should be dismissed—the Rule 19(a) necessary parties thus becoming indispensable. *Shaugnessy v. Pedreiro*, 349 U.S. 48, 54 (1955). The ends to be achieved under these pragmatic standards of Rule 19(b) are those insuring equity and good conscience both to the parties of the lawsuit and those necessary parties not at bar.

The equities of Rule 19(b) demand the protection of the Federal Government's interests by dismissing petitioners' allegations concerning the training and weaponry of the Ohio National Guard, leaving petitioners' remaining allegations intact to face respondents' arguments set forth in the earlier sections of this brief.

Only the Krause-Miller brief considers this point, and its argument fails to acknowledge the lower court's narrow holding relative to the issue of the indispensability of the Federal Government.

CONCLUSION

Respondents respectfully submit that the decision of the lower court is correct and must be affirmed. In the first instance, the Eleventh Amendment, United States Constitution, prohibits the federal courts from assuming subject matter jurisdiction. Secondly, and independent of the above, the lower court correctly held that petitioners' complaints fail to state a claim upon which can be granted.

Further, and again independent of the above, those allegations of petitioners' complaints placing in issue the training and weaponry of the Ohio National Guard involve non-justiciable determinations of a political nature. Finally, those allegations specifically mentioned above, demand dismissal since the Federal Government is an indispensable party to their resolution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert F. Howarth, Jr., one of the attorneys for Sylvester Del Corso, Robert Canterbury, Harry Jones, John Martin, Raymond Srp, and Robert White, respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 9th day of October, 1973, I served three copies of the foregoing Brief of Respondents Del Corso, Canterbury, Jones, Martin, Srp, and White, on the several parties thereto, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record; to-wit:

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The above named parties are the only parties required to be served.

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